No. 20-1070

ORAL ARGUMENT NOT YET SCHEDULED

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

CITY OF SCOTTSDALE, Arizona
Petitioner
v.

FEDERAL AVIATION ADMINISTRATION, and STEPHEN M. DICKSON, in his official capacity as Administrator, Federal Aviation Administration
Respondents

PETITIONER CITY OF SCOTTSDALE'S OPENING BRIEF

[Federal Rules of Appellate Procedure, Rule 15]
[49 U.S.C. § 46110(a)]

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CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

Under Circuit Rule 28(a)(1), Petitioner City of Scottsdale certifies:

Parties and Amici. The Petitioner is the City of Scottsdale, Arizona ("Scottsdale"). Respondents are Stephen Dickson, Administrator of the Federal Aviation Administration (FAA), and FAA. There are no amici in this proceeding.

Rulings under Review. The final agency action under review is FAA's January 10, 2020, decision it had completed its obligations related to its implementation of the Court's February 7, 2018 Order. That decision allowed implementation of new departure routes, known as Area Navigation (RNAV) routes, at Phoenix Sky Harbor International Airport without conducting an adequate environmental review of the routes or addressing Scottsdale's requests to study the impacts of the routes, including the adverse noise impact of the routes, and the impact of the routes on Scottsdale's parks and historic properties.

Related Cases. While Scottsdale's challenge to the FAA final agency action has not been before this Court or any other court, the matter is substantially related to *City of Phoenix v. Huerta*, U.S. Circuit Court of Appeals for the District of Columbia Circuit, Case No. 15-1158, Judgment and Opinion originally entered August 29, 2017, and Judgment and Opinion reissued following revisions on February 7, 2018, and Mandate issued on June 6, 2018.

Respectfully submitted on April 26, 2021.

Dated: April 26, 2021

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GLOSSARY OF TERMS AND ABBREVIATIONS

RNAV		Area Navigation. Refers to the ability to navigate directly between any two points on earth using satellite technology.
PHX		Phoenix Sky Harbor Airport
APA		Administrative Procedure Act
NEPA		National Environmental Policy Act
NHPA		National Historic Preservation Act
§ 4(f)		Section 303 of the Department of Transportation Act.
NextGen		The Federal Aviation Administration's "Next Generation of Air Transportation System."
West Flow		PHX departures using Runways 25R, 25L, or 26.
East Flow		PHX departures using Runways 7R, 7L and 8.
Pre-RNAV Departure Procedures		CHILY, ST. JOHNS, SILOW, MAXXO, STANFIELD, & BUCKEYE, which were made redundant by the 2014 RNAV Departure Procedures
2014 RNAV Departure Procedures		MAYSA, LALUZ, SNOB, YOTES, BNYRD, FTHLS, IZZZO, JUDTH and KATMN implemented on September 24, 2014, and vacated by the Court's February 7, 2018, Judgment
Replacement RNAV Departure Procedures		BROAK, ECLPS, FORPE FYRBD, KEENS, MRBIL, QUAKY, STRMM, and ZEPER, implemented on May 24, 2018
East Valley		Communities in the eastern portion of the Greater Phoenix area, including Scottsdale, Mesa, Tempe, Chandler Gilbert, Fountain Hills, Ahwatukee, Paradise Valley,

		Apache Junction, and Queens Creek

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the City of Scottsdale's ("Scottsdale") petition for review of the Federal Aviation Administration's (FAA) January 10, 2020, final decision not to modify or take any further action to alleviate the noise and pollution impacts caused by the FAA's implementation of new flight departure routes, known as Area Navigation (RNAV) routes, at Phoenix Sky Harbor International Airport (Airport) under 49 U.S.C. § 46110 (a).

FAA's January 10, 2020, decision to the City ("Decision") conclusively stated that FAA would be taking no further action to revise the RNAV departure procedures then in existence and that it would take no further action regarding its proposed action under "Step Two" of FAA's agreement with the City of Phoenix. It, therefore, is a final order under § 46110 (a). Scottsdale timely filed this petition for review on March 10, 2020, within the 60-day period for seeking review under § 46110(a).

STATEMENT OF ISSUES

1. Under NEPA, agencies must consider the environmental impacts of agency action before taking that action.

a. Did FAA violate NEPA when it failed to assess the environmental impacts of the east flow departures thereby implementing new or changed departure procedures without a complete environmental review required by NEPA and FAA's NEPA implementing order?

b. Did FAA violate NEPA when it failed assess the environmental impacts of the two actions it proposed as part of Step Two and alternatives presented by Scottsdale?

2. The National Historic Preservation Act (NHPA), 54 U.S.C. § 300101 *et seq*., and Section 4(f) of the Department of Transportation Act (Section 4(f)), 49 U.S.C. § 303 (c), require agencies to consider an agency action's impact on historic resources, public parks, and recreation areas before acting.

a. Did FAA violate the NHPA and Section 4(f) when it failed to include the east flow departure procedures in its consultation on and analysis of resulting impacts on historic resources, public parks, and recreation areas created by the Replacement Departure Procedures?

b. Did FAA violate NHPA and Section 4(f) when it failed to initiate consultation on or analysis of resulting impacts on historic resources,

public parks and recreation areas by the two actions FAA proposed as part of Step Two and alternatives presented by Scottsdale?

3. By failing to provide any type of environmental analysis for the east flow portions of the nine Replacement Departure Procedures, did FAA violate the Court's February 7, 2018, Order?

STATEMENT OF LAW AND FACTS

I. Statement of Law

A. National Historic Preservation Act, 54 U.S.C. § 30101 *et. seq.*

Congress passed the National Historic Preservation Act ("NHPA") to protect historic buildings and districts. 54 U.S.C. § 300101 (5), A012. Under NHPA, a federal agency having jurisdiction over a proposed "undertaking" shall "take into account the effect of the undertaking on any historic property." *Id*. § 306108, A013.

NHPA regulations require agencies, in consultation with the State Historical Preservation Officer ("SHPO"), local governments, and other parties, to identify the project's "area of potential effect," locate all historic properties in that area eligible for listing on the National Register, and assess the effect of the undertaking on those properties. *See* 36 C.F.R. §§ 800.4(a)–(c), 800.5, A021-A026. Agencies must "[s]eek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties." *Id*. § 800.4(a)(3) , A017. The agency must consult with and consider the views of local governments with jurisdiction over the properties. *Id*. § 800.2(c)(3), A017, A021-A026.

An "adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." *Id*. § 800.5(a)(1), A0210A026. Criteria for an adverse effect include the "[i]ntroduction of . . . audible elements that diminish the integrity of the property's significant historic features." *Id*. § 800.5(a)(2)(v), A021-A026.

If an agency proposes a finding of "no adverse effect" it must "notify all consulting parties . . . and make the documentation available for public inspection prior to approving the undertaking." *Id*. § 800.4(d)(1), A021-A026. Consulting parties have 30 days to review the finding. *Id*. § 800.5(c), A021-A026. If the SHPO or other consulting party disagrees, the agency must either consult with the disagreeing party or request that the Advisory Council on Historic Preservation review the finding. *Id*. § 800.5(c)(2)(i), A026.

If historic properties would experience adverse effects, the agency must consult with the Advisory Council, SHPO, and others to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects . . . ." *Id*. § 800.6(a). NHPA regulations require agencies to reinitiate consultation if presented with new information that shows adverse effects after initiating the federal action. *Id.* § 800.13(b)(1).

B. Section 4(f) of the Department of Transportation Act

Section 303 of the Department of Transportation Act (49 U.S.C. § 303 commonly called "Section 4(f)," allows FAA to approve a project "requiring the use of publicly owned land of a public park . . . or land of an historic site of national, State, or local significance . . . only if—(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm . . . resulting from the use." 49 U.S.C. § 303(c), A006. "[N]oise that is inconsistent with a parcel of land's continuing to serve its recreational, refuge, or historical purpose is a 'use' of that land." *City of Grapevine v. Dept. of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994).

FAA Order 1050.1F—which provides FAA's procedures for implementing NEPA, NHPA, and Section 4(f)—mandates that FAA "must consult all appropriate Federal, state, and local officials having jurisdiction over the affected Section 4(f) properties when determining whether project-related impacts would substantially impair the resources." Order 1050.1F, § 5.3.2, A036.

C. National Environmental Policy Act

The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA") requires agencies to "consider every significant aspect of the environmental impact of a proposed action." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983). Agencies must take a "hard look" at the environmental

consequences and alternatives of a proposed action. *Id*.; 42 U.S.C. § 4332(2)(C), A004. Environmental effects are usually evaluated in environmental assessments (EAs) or environmental impact statements (EISs). *See* 40 C.F.R. § 1501.2–.4, A027-A031.

However, NEPA regulations allow agencies to categorically exclude certain types of activities from more detailed EA or EIS review. Categorical exclusions are "category[ies] of actions which do not individually or cumulatively have a significant effect on the human environment . . . ." *Id*. § 1508.4, A032. NEPA regulations prohibit an agency from using a categorical exclusion if there are "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." *Id.* If extraordinary circumstances exist, agencies must prepare an EA or EIS.

Under Order 1050.1F, a significant noise impact normally exists where "the action would increase noise by DNL 1.5 dB or more for a noise sensitive area that is exposed to noise at or above the DNL 65 dB noise exposure level, or that will be exposed at or above the DNL 65 dB level due to a DNL 1.5 dB or greater increase, when compared to the no action alternative for the same timeframe." A033. However, FAA must give "special consideration" when evaluating the "significance of noise impacts on noise sensitive areas within national parks, national wildlife and waterfowl refuges; and historic sites including traditional

cultural properties. *Id.,* ¶ 11.3, A040. Noise levels below DNL 65 constitute a significant impact or adverse effect where quiet is a critical attribute of or contributing element to historic status. *See id.*, A040. FAA recognizes that the DNL 65 threshold may not sufficiently protect historic sites where "a quiet setting is a generally recognized purpose and attribute." *Id.*

II. Factual Background

Petitioner, the City of Scottsdale, Arizona, ("Scottsdale"), is located approximately three miles northeast of Phoenix Sky Harbor Airport ("PHX"). Due to its proximity to PHX, Scottsdale has always experienced overflights of aircraft. See Figure 1. However, as depicted in Figure 1, before September 14, 2014, those overflights were widely dispersed.

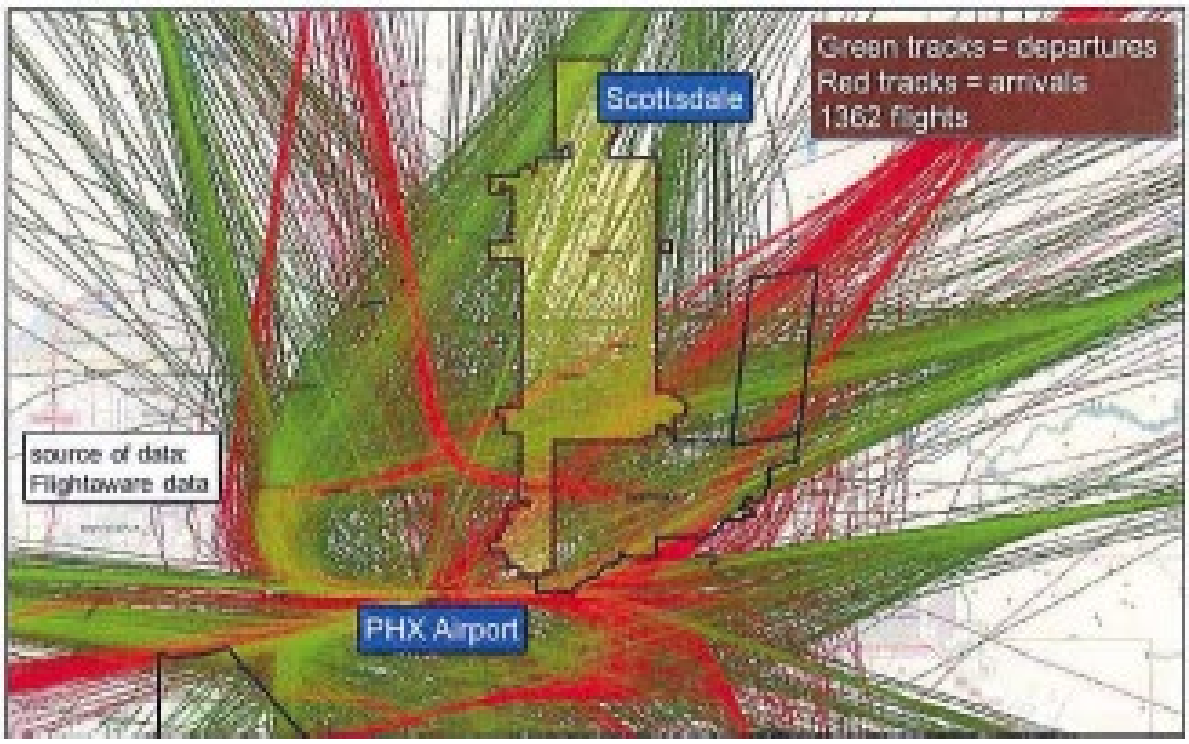

Figure 1 PHX Arrival and Departure Flight Tracks May 5 & 6, 2014 AR 83-025

Due to the long-standing dispersal patterns of aircraft traffic, Scottsdale had established its zoning and other environmental ordinances based, in part, on the flight tracks of arrivals and departures at PHX to ensure that the heaviest concentration of overflights are over areas of Scottsdale that are not as noise sensitive, such as commercial areas instead of residential areas.

A. On September 14, 2014, FAA Published New Flight Procedures that Concentrate Flights Over Scottsdale and Other Areas in the Phoenix Metroplex.

That long history of dispersed flight tracks ended in 2014. As part of its move to "Next Generation of Air Transportation System" ("NextGen"), which involves the implementation of satellite-based Area Navigation procedures or "RNAV" flight procedures, the Federal Aviation Administration ("FAA") published a raft of new flight procedures on September 14, 2014, for the Greater Phoenix airspace including PHX. Included in those new flight procedures were nine RNAV departure flight procedures for PHX.[1] Each of these departure procedures had two components: procedures for "west flow" departures and

[1] The nine Departure Procedures are MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, IZZZO, JUDTH, and KATMN (collectively, "September 2014 RNAV Departure Procedures").

procedures for "east flow" departures.[2] These new flight procedures fundamentally changed how aircraft flew through the Phoenix airspace.

After the implementation of the 2014 Departure Procedures, the flight tracks became much more concentrated and included three new flight procedures, MAYSA, SNOBL, and YOTES, that bisect Scottsdale. See Figure 2.

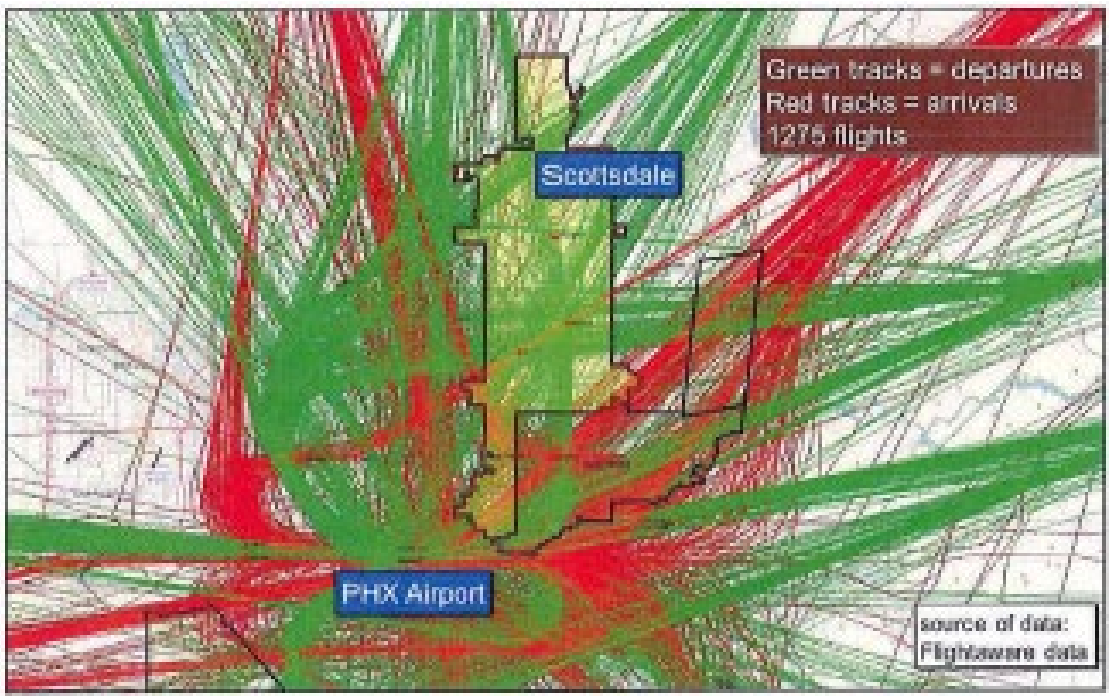

Figure 2 PHX Arrival and Departure Flight Tracks March 15 & 16, 2018; AR83-025

[2] PHX has three runways that run East-West. When air traffic departs to west, or "west flow," aircraft use Runways 25 Right ("25R"), 25 Left ("25L"), and 26. When air traffic departs to the east, or "east flow," aircraft use Runways 7 Right ("7R"), 7 Left ("7L") and 8.

Although the flight tracks are much more concentrated in Figure 2, Figures 1 and 2 represent approximately the same number of flights. The concentrated green line in the center of Scottsdale results from the MAYSA, SNOBL and YOTES departure procedures.

B. City of Phoenix and Various Historic Neighborhoods File a Petition for Review Challenging the FAA's Implementation of the New RNAV Procedures.

After numerous discussions with the City of Phoenix and various historic neighborhoods (collectively, "Phoenix"), FAA failed to produce acceptable alternatives to 2014 Departure Procedures, Phoenix filed petitions for review with this Court, challenging the FAA's implementation of the September 14, 2014, procedures. RJN01. Phoenix alleged that the new procedures were implemented without conducting the proper analyses under the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA") and § 303 of the Department of Transportation ("4(f)"). *Id.*

On August 29, 2017, this Court granted Phoenix's Petition for Review ordering that "the [FAA's] September 18, 2014 order implementing the new flight routes and procedures at Sky Harbor International Airport be vacated; and the matter be remanded to the FAA for further proceedings in accordance with this opinion." RJN02-RJN03 *City of Phoenix, Arizona v. Huerta*, 869 F.3d 963, 975 (D.C. Cir. 2017). In granting Phoenix's petition, the Court concluded that FAA

failed to address three issues when it developed and implemented the 2014 Departure Procedures: NEPA (869 F.3d at 971-973); the National Historic Preservation Act (869 F.3d at 971); and Section 4(f) of the Department of Transportation Act (869 F.3d at 973-975). Thus, any replacement flight procedures would have to be "in accordance with [the Court's] opinion" and address those issues.

C. After the Court's Decision, FAA and Phoenix Sign an Agreement that Prioritizes "West Flow" Departures.

Because FAA believed that it would be difficult to return to the flight procedures that existed before September 2014 ("pre-RNAV flight procedures"), after the Court's Judgment was issued, FAA and Phoenix came to an agreement regarding implementation of the Court's Order. This agreement, the Memorandum Regarding Implementation of Court Order ("Agreement"), sets forth a two-step plan to implement flight procedures for aircraft using PHX that focused first on "west flow" departure routes. AR02.

In Step One FAA agreed to modify the 2014 Departure Procedures at PHX by changing only the west flow departures from PHX to return the flight tracks over western Phoenix to those that existed before 2014. AR02-004. While the Court's August 29, 2017, Judgment stated that *all* September 14, 2014, flight procedures were to be vacated and reviewed in accordance with the Court's Opinion, Step One and the modified departure procedures to be developed did not

address the "east flow" component of the soon-to-be-vacated departure procedures. See AR02-005-007.

In Step Two of the Agreement FAA agreed to consider developing procedures that would address the long-term issues covering the entire Phoenix Metroplex. As described in the Agreement, Step Two was intended to develop new or modified procedures to provide relief from aircraft noise and pollution for the entire Phoenix Metroplex. AR02-007-008. FAA stated in the Agreement that after receiving public comments it would decide which further actions it would take to alleviate aircraft noise and pollution issues in the Phoenix Metroplex. *Id., see also* AR02-004-005.

FAA clarified in the Agreement that all of its decisions – in both Steps One and Two – would comply with all of its statutory and regulatory obligations. As stated in ¶ 7 of the Agreement: "FAA will perform its obligations under Step One and Step Two in accordance with the following authorities: NEPA, 42 U.S.C. § 4321 et seq.; FAA Order 1050.1F, Environmental Impacts: Policies and Procedures; FAA Order 7100.41, Performance Based Navigation Implementation Process; FAA Order 7400.2L, Procedures for Handling Airspace Matters; Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470 et seq.; Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c); and other applicable federal laws." AR02-008-009.

The Agreement was submitted to the Court for approval on November 30, 2018, as part of the Joint Petition for Panel Rehearing ("Joint Petition"). AR01. The Joint Petition also requested that the Court revise its August 29, 2017, Opinion and Judgment to include the following language:

> For the foregoing reasons, we grant the petitions and remand to the FAA, *without vacating*, the portion of the September 18, 2014 order implementing the MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, IZZZO, JUDTH, and KATMN procedures at Phoenix Sky Harbor International Airport *departing Runways 25L, 25R or Runway 26* for further proceedings *consistent with this opinion and the Memorandum Regarding Implementation of Court Order* filed with this Court on November 30, 2017. This Court will stay the issuance of its mandate until June 15, 2018, unless the parties notify this Court prior to that date that the mandate should issue. The parties may each file a status report of no more than 2,500 words on or before May 15, 2018, in the event the mandate has not yet issued.

AR01-016 (emphasis added). This language clarifies that FAA would not address any "east flow" issues because of the litigation. Instead, as the Agreement clarifies, any east flow issues would be addressed in Step Two and at the discretion of FAA. AR02-007-008.

On February 7, 2018, the Court ruled on the Joint Petition. In its *per curiam* ruling, RJN02, the Court rejected the language proposed by FAA. Instead, it modified its Judgment to state:

> ORDERED and ADJUDGED that the petitions for review be granted; the September 18, 2014 order

> *implementing the new flight departure routes at Sky Harbor International Airport be vacated*; and the matter be remanded to the FAA for further proceedings, in accordance with the opinion of the court filed herein this date.

RJN02 (emphasis added).

While the Court did acknowledge that the Judgment would only vacate *departure routes* from PHX instead of all the 2014 Departure Procedures, the Revised Judgment represented a substantial difference from what FAA requested. First, instead of remanding the matter without vacatur, the Court vacated the nine PHX departure flight procedures that FAA published on September 14, 2014. Second, instead of limiting the vacatur to the "west flow" portions of the departure procedures the Court vacated the entirety of the MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, IZZZO, JUDTH, and KATMN procedures, which included the portions of those procedures that departed Runways 7L, 7R, and 8 (that is, the "east flow portions).

D. Undeterred by the Court's Revised and Reissued Judgment, FAA Proceeded with Step One of the Agreement Without Any Changes to Reflecting the Court's Revisions.

1. FAA's community involvement efforts for Step One focused entirely on the environmental impacts of west flow departures.

Instead of revising its Agreement with Phoenix to comply with the Court's revised Judgment, FAA proceeded with public workshops in the Phoenix area supporting the Agreement and the "Two-Step" process set out therein. These

workshops presented the Agreement to the public and outlined FAA's planned implementation of changes to "west flow" departure routes. In none of the materials presented at the public workshops, however, did FAA mention that the Court's Order required FAA to review the environmental impacts of the entire departure routes, not just the west flow portions of the departure procedures. As part of those workshops, FAA drafted a FAQ for its "Step Two" process. In that FAQ, FAA indicated that:

> During Step Two, the FAA would develop new, permanent satellite-based procedures that replace the temporary Step One routes. The FAA would consider permanent routes that approximate the pre-September 2014 routes within a 15-mile radius of the airport. As part of Step 2, the FAA also would consider feedback on procedures throughout the Phoenix area – not just on the westerly departure routes.

AR50-001. Unaware that the Court had required FAA to consider both east and west flow departures, Residents who lived within a 15-mile radius of the airport, which includes Scottsdale, thought that their concerns about east flow flights would be addressed in Step Two. AR068.

Also included in the FAA's FAQ is the following Q&A:

> Q: Does making the changes depend on the court approving the agreement? What if the court doesn't accept the agreement?
>
> A: We intend to proceed with the plan outlined in the agreement unless the court directs us otherwise.

AR50-002. However, the Court did direct FAA otherwise and it did not accept the Agreement. Yet, FAA made no changes to its plan outlined in the Agreement to account for the Court's vacatur or the east flow departures.

Soon thereafter, on February 16, 2018, FAA closed the comment period for the new departure routes without analyzing the east flow routes under NEPA, NHPA, and section 4(f). From February 1, 2018 until February 16, 2018, FAA received 267 comments from Scottsdale residents most of which indicated their belief that FAA needed to change the current flight routes back to the pre-RNAV flight routes. AR68. Never did FAA indicate to the public that both the west flow and the east flow routes would be vacated once the Mandate issued in June 2018.

On March 1, 2018, almost two months after the revised Judgment was issued, FAA issued an update on its Community Involvement webpage that included a link to "information on the court ruling and joint agreement." AR52. But the link takes the reader to a press release from November 30, 2017, and refers to the August 28, 2017, court ruling that had been set aside by February 7, 2018, ruling. *Id.* FAA leaves the impression that the Agreement has been accepted by the Court and that FAA need only address "westerly departure routes." *Id.*

Thus, the communities in the East Valley, including Scottsdale, were led to believe that the environmental impacts of east flow departures and revisions to east flow departure routes would be implemented in Step Two.

2. Environmental Documentation Does Not Mention East Flow Departure Routes

FAA implemented the Agreement almost immediately after it was signed. In January 2018, FAA a Draft Environmental Review for Proposed Categorical Exclusion and a Draft Noise Screening Report to begin its environmental review. AR18 and AR22. However, both documents were limited to assessing the environmental impacts of *only* the "western flow departure" part of the RNAV departure procedures from PHX. As explained in both documents:

> The Proposed Action would revise the western flow of aircraft flying the RNAV SID procedures from runways 25 Left (L), 25 Right (R) and 26, at Phoenix Sky Harbor. The RNAV SIDs being revised are the MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, JUDTH, KATMN, and IZZZO as per the Memorandum.

AR22-009; AR18-009. The Noise Screening clarifies that it only evaluated the noise impacts emanating from the "westerly" portions of the departure procedures. AR22-007. No mention is made in either document about whether an environmental review of eastern portion of the departure procedures was done or forthcoming. Instead, the Environmental Review states that "Step Two of the agreement, which is not part of the current action, … will consider other proposed changes to the Phoenix airspace." AR18-005.

In February 2018, FAA sought to address its failure to properly engage the State Historic Preservation Officer as required by the National Historic

Preservation Act. AR23. FAA sent a letter to Kathryn Leonard, Arizona's State Historic Preservation Officer (SHPO) for a "Section 106 Consultation." FAA indicated that the "undertaking" only concerned "the west flow Area Navigation (RNAV) Standard Instrument Departure (SID) procedures from runways 25 Left (L), 25 Right (R) and 26 …" AR23-001. No mention is made in the Section 106 Consultation Letter about the potential effects on the east flow flights even though the Court had ordered FAA to consider them.

3. FAA's Reports Fail to Mention East Flow Departure Routes

On May 15, 2018, FAA and Phoenix filed their Joint Status Report. RJN07. In the Status Report, FAA stated that it would publish "nine new RNAV procedures" that will "meet the Court's *vacatur* requirements." RJN07-005. However, FAA indicated that the new RNAV procedures "will approximate to the extent practicable, actual departure routes flown prior to September 18, 2014, for all nine of the *western* departure routes." RJN07-004 (emphasis added). FAA knew at the time that the Court's Judgment would vacate *all* "departure routes," not just "western departures." It was clear at this point that FAA had no intention of addressing east flow departures, either through environmental review or returning east flow departures to approximate actual departure routes flown before

September 18, 2014. FAA offered the Court no indication when FAA would meet that portion of the Court's Judgment. [3]

FAA issued a Record of Decision ("ROD") for Step One of the Agreement on May 18, 2018. AR32. That ROD indicated that FAA was approving the "proposed action" to "amend the West Flow Area Navigation (RNAV) Standard Instrument Departure (SID) procedures from runways 25 Left, 25 Right, and 26 at [PHX]" AR32-001. While ROD calls for "nine new RNAV SID procedures," the environmental documentation supporting the ROD concerned the "west flow" RNAV procedures, claiming that the "proposed action" could be categorically excluded. *Id.*

4. On May 24, 2018, FAA Implements the nine Replacement RNAV Departure Procedures.

On May 24, 2018, FAA implemented the nine departure routes with changes only to the west flow component of the departure route. BROAK, ECLPS, FORPE, FYRBD, KEENS, QUAKY, STRZM, and ZEPER flight procedures (collectively, "Replacement Departure Procedures") replaced the September 2014 pre-RNAV Departure Procedures. Despite the Court's Judgment vacating the 2014 Departure Procedures, the Replacement Departure Procedures kept in place the same east

[3] FAA and Phoenix also filed a Joint Status Report on June 4, 2018. RJN08. That status report says essentially the same thing as the May 15, 2018 status report, except that FAA indicates that the nine departure routes had been implemented.

flow departure routes. Those east flow departure routes had not been reviewed under NEPA, NHPA, and 4(f), and not in accordance with the Court's February 7, 2018, Order. To forestall complaints from the public for this failure by FAA, it held out the promise of "Step Two" to rectify those wrongs.

E. Step Two Does Not Include Environmental Review of East Flow Departure Procedures or Result in Changes That Address the Issues Raised in the Court's Order.

On June 6, 2018, the mandate of the court issued. RJN09. But, because of FAA's focus on west flow, FAA's work to comply with the Court's Order was only half done. The Agreement said that FAA would consider additional changes to the Phoenix airspace in Step Two. AR02-007-008. And FAA made promises during Step One that east flow departures would be addressed in Step Two. Soon after issuing the Mandate, local governments in the East Valley weighed in about Step Two.

After FAA implemented the Replacement RNAV Departure Procedures, the Chairman of the Maricopa County Board of Supervisors, Steve Chucri, wrote to FAA on June 18, 2018, telling them that "The communities to the east of Sky Harbor are now impacted by the new NextGen eastbound departure routes. I ask that the FAA undertake meaningful changes to address the eastbound NextGen departures, like the western departures, as this is affecting the quality of life of thousands of northeast Maricopa County residents." AR69. In response, FAA told

him on July 31, 2018 to wait until Step Two, because "[u]nder Step Two of the Memorandum, the FAA agreed to consider comments on procedures outside the scope of Step One. The proposal and adoption of any procedure changes other than those related to western departures would be solely at the FAA's discretion. Nevertheless, the FAA will conduct community outreach meetings with the public as part of Step Two. The purpose of the meetings will be to inform the public regarding any changes to procedures being considered and to solicit public comments." AR70.

In September 2018, the DC Ranch[4] Community Council contacted FAA voicing its concern "about public safety and noise due to the new paths being over far more densely populated areas, as well as the lack of opportunities for public comment during the NextGen National Environmental Policy Act (NEPA) process. The FAA specified that its 'Step 2' will include an opportunity for citizens to address concerns regarding east-bound flights." AR71. In response, the DC Ranch community council was told, "[t]he FAA is committed to engaging the public in accordance with the National Environmental Policy Act and FAA regulations, policies, and procedures….While the agreement focused on west-flow departure

[4] DC Ranch is a neighborhood in the northern part of Scottsdale, next to the McDowell Sonoran Desert Preserve.

procedures, the FAA also agreed to consider feedback on procedures throughout the Phoenix area under Step Two." AR72.

On December 18, 2018, Bud Kern, Chair, of Scottsdale Coalition for Airplane Noise Abatement, wrote to both the Acting Administrator and the Western Pacific Regional Administrator. AR75. In his letter, Mr. Kern told FAA that "The D.C. District Court of Appeals ruled that the FAA's NextGen implementation at Sky Harbor was 'arbitrary and capricious.' Your agency complied with that judgment's requirement to move nine NextGen westbound departure routes back to their original paths. However, the other new NextGen flight routes out of Sky Harbor were implemented in the same improper process…. The FAA should use the Step Two process to present to the public and Scottsdale the process to move the three flight paths using the ZEPER, QUAKY and MRBIL waypoints back to their original and historical routes or as can be mutually agreed to with Scottsdale." *Id.*

On January 18, 2019, Mayor Jim Lane of Scottsdale wrote to then Acting Administrator Dan Elwell stating that "[t]he FAA 'Step Two' public meetings … are court ordered to 'inform the public regarding the alternatives being considered [emphasis added]' after it was determined by the D.C. Circuit Court of Appeals that the FAA was 'arbitrary and capricious' in the establishment of the new flight

paths, and Scottsdale residents are extremely disappointed that it appears no 'alternatives' are planned for presentation." AR73.

On January 28, 2019, Steve Chucri, the Chairman of the Maricopa County Board of Supervisors, once again sent a letter to the FAA. AR77. Unaware that the Court had ordered FAA to change the east flow departures and the west flow, Chairman Chucri pleaded that "the FAA undertake meaningful changes to address the east bound Next Gen departures, like the western departures, as this is affecting the quality of life of thousands of northeast Maricopa County resident." Chairman Chucri sensed that FAA is still considering revisions to the RNAV departure procedures. *Id.*

After the government shutdown of December 2018-January 2019, FAA responded to Chairman Chucri, Mayor Lane and Mr. Kern on March 27, 2019 and April 10, 2019, regarding their letters from January 2019 and December 2018, providing all three with the same response. AR74, AR76, and AR78. Characterizing the Agreement as a "settlement agreement," FAA in its letters asks for patience, telling them that at the Step Two workshops "the FAA will provide information about the recent implementation of Step One and accept any additional comments for Step Two when considering future changes within the Phoenix Metropolitan area. The FAA will be presenting conceptual designs for comment at

the workshops related to departures and arrivals at PHX, including eastern departures." *Id*.

On April 22, 2019, the FAA announced the beginning of Step Two and that it would accept public comments until May 23, 2019 regarding its proposed action to implement "Concepts One and Two." AR59. In addition, the FAA announced that it would hold several "public workshops" about "Concept One," "Concept Two" and other issues of concern to the community. *Id.*

During those workshops and the ensuing comment period, FAA received many comments from the public including: 90 comments regarding Air Quality, 33 comments regarding wildlife and/or habitats, 36 comments regarding environmental justice, 794 comments regarding noise, 133 comments regarding the National Historic Preservation Act, Section 106, 56 comments regarding the performance of Step One, 104 comments regarding airspace changes since 2014, 280 comments regarding what the FAA classified as "other," and 352 comments regarding conceptual airspace changes. AR68. Altogether, the FAA received 1,878 comments about the changes it was making and proposed to make to the airspace over Scottsdale (population 255,310), Mesa (population 439,041), Tempe (population 192,364), Fountain Hills (population 22,489) and Salt River Pima-Maricopa Indian Community (population 9,357). AR61. It was during this comment period that Scottsdale submitted extensive comments regarding the

impact of east flow departure procedures on Scottsdale and offered alternatives to FAA's proposed action. AR83.

On January 10, 2020, FAA issued its final Decision regarding the Step Two process, including its decision on its two proposed actions, and its response to public's comments and proposals. AR61. No environmental analysis of the proposed actions or the public's suggested alternatives accompanied the Decision, nor has any such analysis been made public. Despite receiving many comments and comprehensive proposals indicating a purpose and a need for further changes to flight procedures to address the noise and pollution problems in the Greater Phoenix Area, the FAA simply concluded, upon review of the comments, that "[t]he FAA will not be taking further action under Step Two" without providing its rationale between the facts alleged in the public comments and its decision. AR61-001.

After the January 10, 2020, Response to comments were issued, it was immediately apparent that FAA had no intention of finishing its compliance with the Court's Order, or reviewing the environmental effects that the RNAV flight procedures have had or will have on the Scottsdale and the rest of the East Valley.

On March 10, 2020, Scottsdale filed this petition for review.

SUMMARY OF ARGUMENT

Over the past seven years, Scottsdale and its residents have suffered through an increase in aircraft noise due to the Federal Aviation Administration's implementation of satellite based "RNAV" procedures at Phoenix Sky Harbor Airport that changed the way aircraft flew through the Phoenix airspace. Because of the City of Phoenix's successful Petition for Review, the Court vacated nine RNAV departure procedures from PHX.

While this would have seemed to benefit both Phoenix and Scottsdale, the FAA had other ideas. It entered into an agreement with Phoenix that allowed FAA to change only that part of the departure procedures where the aircraft depart to the west. The agreement made no promises about studying the environmental impacts or revising departures to the east. FAA did promise, though, that it would consider revising its departure procedures that would include departures to the east. But, after developing proposed actions and submitting them for comment, and hearing many public comments regarding the need for such action on January 10, 2020, the Federal Aviation Administration decided it was finished with implementing the Court's February 7, 2018.

The decision left in place departure procedures that have never subjected to environmental analysis under NEPA, NHPA, and Section 4(f). And it terminated FAA's proposed action to revise those departure procedures with no environmental

analysis. It is just this type of intransigence, opacity, and lack of environmental review which NEPA, the NHPA, and Section 4(f) are designed to prevent.

Therefore, the Court should grant Scottsdale's Petition for Review and vacate and remand the May 24, 2018, Departure Procedures for the following reasons:

1) **Final Order.** The January 10, 2020, Decision is a final order that marked the conclusion of FAA's implementation of the Court's February 7, 2018 Order and the conclusion of the FAA' implementation process for the departure procedures published on May 24, 2018. In the alternative, if the Court finds that FAA's May 24, 2018, publication of the departure procedures is the reviewable order, the 60-day period for filing a Petition for Review was tolled due to FAA's statements and actions leaving the public with the impression that FAA would address their concerns about the east flow departures.

2) **Failed to Comply with the Court's February 7, 2018 Order.** By providing no type of environmental analysis on the east flow portions of the departure flight procedures, FAA has failed to comply with the Court's February 7, 2018, Order.

3) **NEPA, the NHPA, and Section 4(f).** (a) FAA's decision to allow the east flow of departure procedures to continue to fly over Scottsdale—despite the absence of environmental review—has resulted in aircraft flying new or modified

east flow departure procedures that have not been subject to *any* environmental review, in violation of NEPA, the NHPA, and Section 4(f). (b) FAA's decision to adopt the "no action" scenario and not proceed with either Concept One or Concept Two providing no environmental analysis violates NEPA, NHPA and Section 4(f).

STANDING

Under Circuit Rule 28(a)(7), Scottsdale has standing to bring this action because it has suffered an "injury in fact" brought about by FAA's implementation of the September 2014 Departure Procedures that directed concentrated flights over Scottsdale and other areas in Phoenix Metroplex departing out of Phoenix Sky Harbor International Airport (PHX).

To establish standing, Scottsdale must show that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely that the injury will be redressed by a favorable decision. *D&F Afonso Realty Trust v. FAA*, 216 F.3d 1191, 1194 (D.C. Cir. 2000).

Following this Court's judgment on August 29, 2017 (the "Court Order") vacating FAA's September 2014 Departure Procedures (which included both westerly and easterly departures out of PHX over Phoenix and Scottsdale neighborhoods), the FAA entered into an agreement (the "Agreement") with Phoenix regarding implementation of the Court Order. The Agreement called for an implementation of a two-step plan. Step One, which primarily focused on westerly flights over Phoenix, was intended to be a short-term remedial measure for concentrated flights over Phoenix; and Step Two, which affected the entire Phoenix Metroplex, including Scottsdale, was intended to implement a long-term

remedial procedure for the aircraft noise and fume resulting from FAA's implementation of the 2014 Departure Procedures that affected the Phoenix Metroplex as a whole. Thereafter, the FAA requested public comments on the two proposed actions and solicited public input regarding long-term solutions to the noise problems in the Phoenix Metroplex as well. The FAA stated in the Agreement that after receiving public comments it would decide which further actions it would take to alleviate aircraft noise and pollution issues in the Phoenix Metroplex. Agreement pages 4-5. However, several months after the public comment period closed, the FAA issued a final decision by stating unequivocally that "FAA will not take further action under Step Two." Decision, p. 1. .

I. Scottsdale Suffered Injury In Fact

Scottsdale suffered actual injury that is concrete and particularized that is fairly traceable to the challenged flight procedures and FAA's Final Decision.

A. Concrete and Particularized Injury

Scottsdale is a municipal government that was incorporated in June, 1951. Declaration of Sherry Scott (hereinafter "Scott Decl."), ¶3. The Arizona Constitution in Article XIII grants cities such as the City of Scottsdale with the ability to adopt a city charter form of government. Scott Decl. ¶4. City charters establish the powers of local city government necessary to respond to its citizens' needs. Scott Decl. ¶4. Title 9 of the Arizona Revised Statute further supplements

Scottsdale's Charter authority to define the powers and functions of the City of Scottsdale's government within the State of Arizona. Scott Decl., ¶ 4. Title 9 of Arizona Revised Statutes and Article 1, Section 3 of Scottsdale's Charter empower Scottsdale with a wide range of authority to make and enforce ordinances and regulations to manage its infrastructure, to protect the health, safety and welfare of its citizens and to preserve and enhance the environment, livability and aesthetic quality of the City. Scott Decl., ¶ 5. When the FAA implemented the September 2014 Departure Procedures and its final Decisions, such actions harmed the particularized and concrete interests of the City of Scottsdale, for example, the authority and ability to make and enforce ordinances to regulate and manage its infrastructure, to preserve and enhance the environment, livability, and aesthetic quality of the City, among other harms it suffered.

B. Actual Injury to its Concrete Interests

1. Scottsdale's Real Property Interests

The FAA's implementation of September 2014 Departure Procedures and its final Decision have harmed Scottsdale's real property interests. Scottsdale owns parks, libraries and event and recreational centers that are being adversely affected by the 2014 Departure Procedures. Scott Decl., ¶ 11-15. The FAA's implementation of 2014 Departure Procedures, by placing properties such as McDowell Mountain Ranch Park for which quiet is a fundamental attribute, in

direct path of the overflights, have caused the value of such properties to decline. Thus, substantial increase in noise and air pollution, to great extent, have defeated the purpose of those public parks and libraries. Scott Decl., ¶ 15.

Additionally, Scottsdale also owns facilities, such as Westworld, which is a City event center which includes outdoor venues for equestrian and other uses. In these places, not only has the aviation noise been detrimental to the purpose of various cultural and equestrian events where quiet can be an essential element to enjoying the music and other sound effects, but the characteristics of these places have been altered by the noise and fumes emanating from the constant overflights. Scott Decl., ¶ 14-15

III. Procedural Harm

Where a party has been accorded a procedural right to protect his concrete interests, "the primary focus of standing inquiry is not the imminence or redressability of the injury to the plaintiff, but whether a plaintiff who has suffered personal and particularized injury has sued a defendant who has caused that injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n. 7 (1992). Nonetheless, the injury in fact requirement is a hard floor of Article III jurisdiction that cannot be altered by statute. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Scottsdale's harm to its real property interests, discussed in preceding paragraphs, satisfies the injury in fact requirement.

A. Scottsdale Has Been Accorded A Procedural Right

Scottsdale has been accorded procedural rights with respect to its role as a municipal government and as an owner of public lands. To sufficiently show that it has suffered procedural harm, Scottsdale must show that a federal agency (i.e., the FAA) has failed to make an effects determination and has failed to consult with Scottsdale. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 664-65 (1996) Furthermore, Scottsdale must also show that the failure to make an effects determination or to consult affects its concrete aesthetic and recreational interests in order to sufficiently allege procedural harm. *Fla. Audubon Soc'y*, 94 F.3d at 666. *See Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 183 (2017).

Specifically, "[t]o establish injury-in-fact in a 'procedural injury' case, petitioners must show that 'the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff.'" *City of Dania Beach v. FAA*, 485 F.3d 1181, 1185 (D.C. Cir. 2007) (citation omitted).

B. Proprietary Interests of Scottsdale

When the FAA implemented the 2014 Departure Procedures, Scottsdale's ability to enact ordinances to protect the City's properties and enhance the aesthetic and historic characteristic or the environmental quality from the noise and air pollution were severely restricted in the fact of a federal government decision. This constitutes injury to Scottsdale's proprietary rights. Here, as a result of the

federal government's action, City of Scottsdale was unable to prevent alteration of character of its parks and cultural event venues from taking place as a consequence of aircraft noise and pollution. Scott Decl., ¶ 9-12.

As a municipal government, Scottsdale's ability to protect the health, safety and welfare of its citizens and to preserve and enhance livability, aesthetic and environmental quality of the city, are some of the city's most valuable and intangible proprietary interests. Scott Decl., ¶ 8. Scottsdale's proprietary interests are concrete interests because such interests are germane to the purpose of any municipal government. The following situation illustrates the procedural harm to its concrete interest: Scottsdale owns the Scottsdale Airport which has been adversely impacted by FAA's implementation of the departure routes out of PHX. While it is the local proprietor (i.e., the City of Scottsdale) that is primarily responsible for the regulation of airport noise, its hands were tied from managing the noise over its own airport from the aircraft departing from the PHX upon FAA's implementation of the 2014 Departure Procedures. *See Di Perri v. Federal Aviation Admin*., 671 F.2d 54, 58 (1st Cir. 1982) ("The FAA itself has steadfastly maintained that the local proprietor has primary responsibility for the regulation of airport noise.").

C. FAA's "Decision" Harms Scottsdale's Concrete Economic, Environmental and Aesthetic Issues and its Procedural Rights.

FAA's actions have also adversely impacted the Scottsdale's interest in protecting its historic resources. Scottsdale expends substantial resources and exercises its powers to protect its aesthetic and historical character. A city's interest in managing its historic properties is explicitly recognized in the National Historic Preservation Act of 1966 which requires consultation with local governments with jurisdiction over affected areas. 36 C.F.R. § 800.2(c)(3). *See City of Jersey City v. CONRAIL*, 668 F.3d 741, 744–46 (D.C. Cir. 2012) (recognition of the harm to City's "historic and environmental interest" due to NEPA and NHPA violations).

D. Scottsdale's Injury is Fairly Traceable to the Challenged Action

Scottsdale's interest in protecting its historic resources, its procedural injuries and direct harm to its real property interests are all shown to have a causal connection to the FAA's implementation of the 2014 Departure Procedures. Furthermore, to the extent that the FAA decided to not take any further action without offering any explanation, Scottsdale would ultimately be able to show that its claim against the FAA on the grounds that its actions are its Final Decision was arbitrary and capricious or otherwise not in accordance with the law under 5 U.S.C. § 706(2)(A), (D). *See Utah v. Evans*, 536 U.S. 452, 464 (2002). Moreover, inasmuch as Scottsdale can show success on the merits it would likely be able

show that it would obtain relief that directly redresses the injuries suffered. *Id. See also Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 7, (D.C. Cir. 2005).

1. Scottsdale Continues to Suffer Concrete Injuries Which Would be Redressed By Court's Favorable Decision Vacating Flight Procedures for Aircraft Departing to the East of PHX

When the FAA made its final Decision to "take no further action under Step Two," that decision falls squarely within the definition of an agency's final decision because it determined the rights or obligations of Scottsdale from that point forward. In other words, after the FAA made that decision, it was patently clear that the increased overflights throughout Scottsdale neighborhoods would continue to adversely affect Scottsdale in light of the FAA's refusal to take any further action. Indeed, FAA took no further action and Scottsdale continues to suffer concrete injuries. Thus, there is a causal connection between Scottsdale's injuries described in preceding paragraphs, FAA's 2014 Departure Procedures, and its final Decision. Therefore, should the Court vacate the disputed departure procedures, Scottsdale would not continue to suffer concrete injuries described herein and such order to vacate the current disputed departure procedures would fully redress Scottsdale's injuries.

ARGUMENT

The U.S. Supreme Court held in *Burbank v. Lockheed Air Terminal* 411 U.S. 624, 638-9 (1973) that "[t]he Federal Aviation Act requires a delicate balance between safety and efficiency, . . . and the protection . . . of persons on the ground." In its February 2018 Judgment, RJN05, this Court vacated nine departure flight procedures from Phoenix Sky Harbor Airport ("PHX") because, in part, of FAA's failure to protect people on the ground. By focusing solely on the environmental impacts of the "west flow"[5] portions of those vacated departure procedures, FAA has ignored the legitimate concerns of the people on the ground underneath the "east flow"[6] of the vacated departure procedures. By concluding its implementation of departure procedures at PHX without fully complying with the Court's February 7, 2018, Judgment and without fully complying with the National Environmental Policy Act ("NEPA"), National Historic Preservation Act ("NHPA"), Section 4(f) of the Department of Transportation Act, FAA has failed to achieve "balance," rendering its decision on January 10, 2020, arbitrary and capricious and not in accordance with law.

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[5] "West Flow" refers to when air traffic at PHX departs using Runways 25R, 25L, or 26.

[6] "East Flow" refers to when air traffic at PHX departs using Runways 7R, 7L, or 8.

I. Events Leading to the January 10, 2020, Decision.

As explained in greater detail in the Statement of Facts, a series of events led to FAA's decision January 10, 2020, Decision.

- *September 14, 2014*, FAA implemented, among other flight procedures, nine new RNAV departure routes, MAYSA, LALUZ, SNOBL, YOTES, BNYRD, FTHLS, JUDTH, KATMN, and IZZZO (collectively, "2014 Departure Procedures") at PHX.
- *June 9, 2015*, City of Phoenix and several of its historic neighborhoods (collectively, "Phoenix") file Petitions for Review in this Court challenging FAA's September 14, 2014, Decision. RJN01
- *August 29, 2017*, this Court grants Phoenix's Petition for Review and orders the vacatur and remand of the September 14, 2014, Departure Procedures. RJN02 and RJN03.
- *November 30, 2017*, Phoenix and FAA sign Memorandum Regarding Implementation of Court Order (the "Agreement"). The Agreement sets up a two-step process for addressing the Court's Order granting the Petitions for Review. AR02.
- *February 7, 2018*, the Court revises its Judgment and Opinion limiting its vacatur to the nine 2014 Departure Procedures from PHX listed above. It

stays issuance of the Mandate until June 6, 2018. RJN04, RJN05, and RJN06.

- *May 24, 2018*, FAA implements nine new RNAV departure procedures, BROAK, ECLPS, FORPE, FYRBD, KEENS, QUAKY, STRRM, and ZEPER, (collectively, "Replacement Departure Procedures") to replace the pre-RNAV procedures and the vacated 2014 Departure Procedures. The east flow operations of Replacement Departure Procedures are the same as the vacated 2014 Departure Procedures. This represented the end of Step One under the Agreement.
- *June 6, 2018*, the Court's Mandate issued vacating the nine 2014 Departure Procedures and requiring FAA to comply with NEPA, NHPA and Section 4(f) in developing new procedures. RJN09.
- *January 10, 2020*, FAA announced that it completed Step Two and the Agreement. FAA stated that it will not be evaluating the environmental impacts of any Step Two proposals and will not follow through on any proposals to revise the east flow portions of the Replacement Departure Procedures ("January 10, 2020, Decision"). AR61.

II. The January 10, 2020, Decision was the Consummation of FAA's Decision-Making Process Indicating It Had No Intent to Assess the Environmental Impacts of the East Flow RNAV Procedures.

A. The January 10, 2020, Decision Is a Final Order that Marked the Conclusion of FAA's RNAV Route Implementation Process.

An "order" is "the whole or a part of a final disposition . . . of an agency in a matter other than rule making . . . ." 5 U.S.C. § 551(6). "To be deemed 'final' and thus reviewable as an order under 49 U.S.C. § 46110, an agency disposition 'must mark the consummation of the agency's decision-making process,' and it 'must determine rights or obligations' or give rise to legal consequences.'" *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 598 (D.C. Cir. 2007) (quoting *Dania Beach*, 485 F.3d at 1187). The term "order" in § 46110 "should be read 'expansively.'" *Dania Beach*, 485 F.3d at 1187. Under § 46110, "an 'order' must be final, but need not be a *formal* order, the product of a *formal decision-making process*, or be issued personally by the Administrator." *Aerosource, Inc. v. Slater*, 142 F.3d 572, 578 (3d Cir. 1998) (emphasis added). The "core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992); see also, *Friedman v. FAA*, 841 F.3d 537, 541 (D.C. Cir. 2016) (a final order is one that "mark[s] the consummation of the agency's decision-making

process" and that either determines "rights or obligations" or is a source of "legal consequences").

Ever since FAA signed the Agreement in November 2017, it has always looked to the Agreement as the controlling document, not the Court's Order. The Agreement sets out clearly the FAA's decision-making process for the "implementation of the Court's [February 7, 2018] Order." Each environmental document, each interaction with the public, FAA spoke in terms of compliance with the Agreement. Thus, it was not until January 10, 2020, when FAA told the public that "FAA will not be taking further action under Step Two, and has now completed all of its obligations under the Implementation Agreement," AR61, that FAA's decision-making regarding implementation of the RNAV departure procedures at PHX was concluded.

Likewise, the January 10, 2020, Decision determined "rights [and] obligations" and produced "legal consequences." *Friedman,* 841 F.3d at 541; see also *City of Phoenix,* 869 F.3d at 969. FAA repeatedly promised that it would explore revisions to the Replacement RNAV routes that would address the environmental impacts of the east flow departures, as part of Step Two, because the Agreement required it to consider those revisions. FAA promised in a FAQ that in Step Two it "would consider permanent routes that approximate the pre-September 2014 routes within a 15-mile radius of the airport. As part of Step 2, the

FAA also would consider feedback on procedures throughout the Phoenix area." AR50-001. FAA's decision-making process did not end with implementing the Replacement Departure Procedures on May 24, 2018, it ended on January 10, 2020, when the FAA told the public it was finished with its obligations under the Agreement. At that point, the rights and obligations of Scottsdale became manifest and pursuing a legal challenge against the FAA's actions became ripe. FAA's reconsideration of RNAV routes, given the Court's Order did not end until it issued the January 10, 2020, Decision, at which time FAA clarified that it would not (1) change the Replacement RNAV routes to mimic pre-RNAV east flow routes; and (2) conduct any environmental analysis as required by NEPA, NHPA and Section 4(f) of the east flow components of the Replacement RNAV routes or its "Step Two" proposed actions "Concept One" and "Concept Two." And never before, FAA concluded its own decision-making and finally determined Scottsdale's rights and obligations under NHPA, Section 4(f), and NEPA. *Dania Beach*, 485 F3d at 1187.

B. Even if the Court Finds that FAA's May 24, 2018, Commencement of the Replacement RNAV Routes Is an Order, the 60-day Period for Filing a Petition for Review Was Tolled.

Even if the Court accepts the argument that the initial implementation of the replacement RNAV routes on May 24, 2018 was FAA's final "order," Scottsdale's petition remains reviewable under 49 U.S.C. § 46110(a). A petition for review may

be filed after 60 days if "there are reasonable grounds for not filing by the 60th day." 49 U.S.C. § 46110(a), A010. This Court has found "reasonable grounds" where a petitioner waited to file a legal challenge due to agency representations it would address petitioner concerns. *See, Phoenix v. Huerta*, 869 F.3d 963, 968-970 (D.C. Cir. 2017). In *Paralyzed Veterans of America v. Civil Aeronautics Board*, 752 F.2d 694, 705 n.82 (D.C. Cir. 1985), the D.C. Circuit found that petitioners had "reasonable grounds" for waiting over 60 days when it was "[a]ware that the rule might be undergoing modification, and unable to predict how extensive any modification would be . . . ." 752 F.2d 694, 705 n.82 (D.C. Cir. 1985), *rev'd on other grounds*, *Dep't of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597 (1986). Petitioners were reasonable in "elect[ing] to wait until the regulation was in final form before seeking review." *Id*.

Similarly, in *Safe Extensions*, this Court found that a manufacturer had reasonable grounds to delay its petition for review of an FAA advisory circular establishing requirements for its products. 509 F.3d at 602–604. In response to "significant uproar in the industry," FAA represented that it would revise the circular. *Id*. at 603. *Safe Extensions* allowed the 60-day petition filing period to expire "[b]ased on [FAA's] representation, and hoping to avoid litigation, the company decided to wait and see if the FAA [would] address[] the issues . . . ." *Id*. *Safe Extensions* had reasonable grounds for filing after 60 days. *Id*. at 604. The

"delay simply served properly to exhaust the petitioners' administrative remedies, and to conserve the resources of both the litigants and this court." *Id*. (quoting *Paralyzed Veterans*, 752 F.2d at 705 n.82).

As this Court pointed out in *City of Phoenix* "the key in *Safe Extensions* was that the agency left parties 'with the impression that [it] would address their concerns' by replacing its original order with a revised one. There we were concerned that the agency's comments 'could have confused the petitioner and others.'" 869 F.3d at 970.

Any "delay" by Scottsdale in filing its petition resulted from repeated representations by FAA it would consider revisions to the east flow RNAV routes as part of "Step Two." FAA's promises it would consider revisions to address community concerns began during the public comment phase of Step One. AR68. That belief was underscored by FAA's doing not perform any environmental analysis of the east flow departure routes before implementing the Replacement RNAV Departure Procedures in May 2018. See AR18-AR38.

Scottsdale reasonably relied on the commitment from Acting Administrator Elwell—the most senior FAA official—to establish a process in which Scottsdale could participate. Accordingly, Scottsdale submitted extensive comments and noise impact information to FAA in May of 2019, including suggestions for alternative RNAV procedures. AR83. Over almost nine months, from February 7,

2018, to January 10, 2020, FAA repeatedly invited Scottsdale, its residents and the residents of the East Valley to participate in processes with the promise that FAA would consider the RNAV routes to address the concerns about east flow departures over the East Valley. The FAA's pattern of practice led Scottsdale and other reasonable observers to think FAA might fix the noise problem with east flow departures without being forced to do so by a court. *See City of Phoenix*, 869 F.3d at 970. And, given the FAA's serial promises, petitioning for review soon after the May 2018 "Order" might have shut down the Step Two process or, at least, stopped any dialogue between the petitioners and FAA. *See, Id.* Scottsdale relied on the FAA's repeated commitments and refrained from filing a petition in the reasonable expectation that FAA's ongoing consideration would address its concerns.

If the Court decides, as it did in *City of Phoenix*, that the May 24, 2018, implementation of the Replacement RNAV Departure Procedures is the final "order," then the Court should find, as it did in *City of Phoenix*, that the 60-day period for filing a petition for review should be tolled because of Scottsdale's reasonable belief that FAA would address the east flow issues without resorting to litigation.

C. The FAA's Action on January 10, 2020 Was a Final Agency Action in and of Itself.

If the Court rejects both of the above arguments, then the Court should consider the January 10, 2020, Decision as the conclusion of "Step Two" of the Agreement that constitutes a final order of the FAA. As FAA stated in the January 10, 2020, Decision, it "will not be taking further action under Step Two, and has now completed all of its obligations under the Implementation Agreement." AR61-001.

The FAA made this decision (i) without complying with agency procedures for issuing a final agency order, and (ii) without conducting the required environmental review of its actions, such as Concept One and Concept Two. Its Decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The Decision constitutes a final order of the FAA because it is not "merely tentative or interlocutory," but an "unequivocal statement that "the FAA will not take further action under the Step Two." *See Amerijet Int'l, Inc. v. United States Dep't of Homeland Sec.*, 43 F.Supp.3d 4, 13 (D.D.C. 2014). In *Amerijet*, the court determined that the Department of Homeland Security's "security directive," constituted a final order because it marked the consummation of the agency's decision-making process and determined the rights or obligations or caused legal consequences to the individuals affected by the security directive. *Id.* at 13; *City of*

Dania Beach, Florida v. Federal Aviation Administration, 485 F.3d 1181, 1188 (D.C. Cir. 2007). The FAA's decision to terminate the Step Two process determined the rights of Scottsdale, the residents of Scottsdale, and all other citizens who provided comments describing the aviation noise and pollution they have suffered because of the FAA's changes to the flight paths. *Id*.

By taking "no further action" on Step Two the FAA has indicated it has concluded its consideration of the Step Two process. Thus, the Decision constitutes a "final agency action." In *Smirnov v. Clinton*, 806 F.Supp.2d 1, 11 (D.D.C. 2011) the court held that, "[i]n the Court's view, this decision to take no further action on, and in effect, to conclude consideration of, pending applications constitutes final agency action. . ." Similarly, here, the FAA's decision not to take any further action constitutes a final agency action amenable to a Petition for Review under 49 U.S.C. § 46110.

III. FAA Has Not Complied with The Court's February 7, 2018, Order and In So Doing Has Not Complied With NEPA, NHPA or Section 4(f)

The Court's February 7, 2018, Judgment orders that the "September 18, 2014 order implementing the new flight departure routes at Sky Harbor International Airport be vacated; and the matter be remanded to the FAA for further proceedings, in accordance with the opinion of the court filed herein this date." RJN05. The Order does not draw a distinction, as the FAA has, between

"west flow" departures and "east flow" departures. Because FAA's environmental analysis for the Replacement Departure Procedures focused exclusively on the "west flow" departures leaving the east flow departures unanalyzed, FAA has not complied with the Court's Order, NEPA, NHPA, or Section 4(f).

A. Vacatur Requires that FAA Replace Pre-RNAV Flight Procedures with Flight Procedures that Account for Both West Flow and East Flow.

The ordinary effect of vacatur is to "set aside" the challenged action, 5 U.S.C. § 706(2), and return the parties to the *status quo ante*. See *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 671-72 (D.C. Cir. 2006) (holding that Commission's order vacating its previous investigation into telephone rates restored its prior determination that the rates were lawful); *Air Transport Ass'n of Canada v. FAA*, 254 F.3d 271, 277 (D.C. Cir. 2001), *judgment modified*, 276 F.3d 599 (D.C. Cir. 2001) (noting that vacatur of agency fee schedule "had the effect of restoring the *status quo ante*").

By vacating the nine 2014 Departure Procedures, the Court restored the *status quo ante*, namely that the Pre-RNAV departure routes were in effect and the 2014 Departure Procedures never existed. *See Action on Smoking & Health v. Civil Aeronautics Bd.,* 713 F.2d 795, 797 (D.C. Cir. 1983) ("By vacating or rescinding the recissions [sic] … the judgment of this court had the effect of reinstating the rules previously in force…."). Yet, FAA, in establishing the Replacement RNAV

Departure Procedures, presumed that the 2014 Departure Procedures were still in existence, at least regarding "east flow" departures. For example, in FAA's May 2018 Noise Screening Analysis, FAA states that the "Proposed Action would revise the current western flow of aircraft," but "there are no proposed changes to east flow operations" therefore they were not included in the noise screening analysis. AR36-006. Because the Proposed Action is the west flow departure routes, the noise impact of the west flow routes, but not the east flow routes, is compared with the pre-RNAV flight procedures in use before September 2014. AR36-014-015. Based on the Court's vacatur, when FAA assessed the environmental effects of the Replacement Departure Procedures, FAA had to compare the environmental impacts of its proposed departure procedures with those that existed before September 2014. FAA has not done this, at least not for the east flow departures.

As a result of the vacatur, in developing and implementing new departure procedures for PHX to replace the Pre-RNAV routes, FAA had to comply with its obligations under NEPA, FAA Order 1050.1F, Environmental Impacts: Policies and Procedures, FAA Order 7100.41, Performance Based Navigation Implementation Process, FAA Order 7400.2L, Procedures for Handling Airspace Matters, Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470 et seq., Section 4(f) of the Department of Transportation Act, 49 U.S.C. §

303(c); and other applicable federal laws as if the 2014 Departure Procedures never existed. This is true for both the west flow departures and the east flow departures. Instead, FAA only analyzed the environmental impacts of the west flow departures and failed to comply with its statutory and regulatory obligations for the east flow departures.

By rejecting FAA's proposed revisions to the Judgment, the Court required FAA to develop replacement departure procedures (both west and east flow) for PHX that would replace, not the vacated 2014 Departure Procedures, but the pre-RNAV flight procedures. Any replacement departure procedures must be developed and implemented in "accordance with the Court's opinion," and comply with the FAA's statutory duties under NEPA, NHPA, 4(f) and FAA Orders and regulations. Finally, while the Court granted the request to stay the Mandate until June 15, 2018, it did not give its blessing to the Agreement. FAA has never mentioned the Court's February 7, 2018, Judgment in any of its materials submitted for public review or on its "Community Involvement" website. Although the Joint Petition and the Agreement were included as part of this Administrative Record, the Court's reissued February 7, 2018, Judgment and Opinion were not.

Therefore, the Court's vacatur of the 2014 Departure Procedures required FAA to consider both west and east flow departures in its environmental analysis. Because it did not, FAA's decision is arbitrary and capricious.

B. FAA's January 10, 2020, Decision Violates NEPA.

FAA's refusal to take any action to assess and mitigate the environmental impacts of east flow departure procedures in either Step One or Step Two allowed a change in the departure procedures to occur without environmental review, in violation of NEPA. NEPA requires agencies to "consider every significant aspect of the environmental impact of a *proposed* [agency] action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983) (emphasis added) (citation omitted). NEPA thus ensures "that *before* an agency acts, it will 'have available' and 'carefully consider detailed information concerning significant environmental impacts.'" *City of Phoenix*, 869 F.3d at 971 (alteration in original) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The NEPA process also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of [the] decision." *Robertson*, 490 U.S. at 349.

FAA's own NEPA order requires that it review the environmental impacts of proposed new flight procedures or changes to existing procedures—like the east flow departures. *See, e.g.*, FAA Order 1050.1F, ¶ 3-1.2.b.(12) (requiring an environmental assessment for new air traffic control procedures and modifications

to currently-approved procedures that routinely route aircraft over noise sensitive areas at less than 3,000 feet above ground level (AGL)); *id*. ¶ 5-6.5 (identifying "actions involving establishment, modification, or application of airspace and air traffic procedures" as eligible for a categorical exclusion under NEPA) (emphasis added).

However, in violation of NEPA, FAA has not environmentally reviewed the east flow Departure Procedures. Nor has it provided any environmental analysis for Concept One and Concept Two it raised in Step Two. FAA's environmental reviews for Steps 1A and 1B, which included the west flow Departure Procedures, assumed that the court would modify its Judgment to only remand without vacatur the west flow departure procedures. AR18-AR38. Thus, FAA considered the environmental, including noise, effects of only the west flow Departure Procedures. *Id*. Because the nine departure procedures vacated by the Court included both west flow and east flow components, FAA had to comply with NEPA regarding the east flow components. However there has been *no* NEPA analysis of east flow flight routes currently being flown.

By limiting environmental review of the Replacement Departure Procedures to the west flow flight routes, FAA's Replacement Departure Procedures affirmed and perpetuated *new* east flow flight patterns for aircraft departing PHX implemented with no environmental review and without providing the public with

an opportunity to review, or comment. The January 10, 2020, Decision therefore violates NEPA and FAA's own order requiring environmental analysis of new or modified flight procedures and is arbitrary and capricious. *See* FAA Order 7400.2M, ¶ 32-2-1 (requiring environmental review for "procedural changes that create new or alter existing flight tracks over noise sensitive areas"); FAA Order 1050.1F, ¶ 3-1-2.b.(12) (requiring an environmental assessment for "modifications to currently approved procedures" under certain circumstances).

C. FAA's January 10, 2020, Decision violates NHPA and Section 4(f) because FAA has not considered impacts to historic resources, parks, or recreation areas due to East Flow.

The January 10, 2020, Decision allowed the Replacement Departure Procedures to continue with no analysis of the impacts of the east flow departure routes on historic properties, parks, and other public resources, in violation of NHPA and Section 4(f). FAA must "document compliance" with its NHPA and Section 4(f) obligations, including "any required consultations, findings, or determinations." FAA Order 1050.1F, ¶ 5-5. FAA's obligations under NHPA and Section 4(f) are independent of FAA's obligations under NEPA and must be satisfied *prior* to making a flight procedure decision. *See id*.

NHPA "requires Federal agencies to take into account the effects of their undertakings on historic properties." 36 C.F.R. § 800.1(a). For any undertaking—including modifying an existing flight procedure—that has the potential to affect

historic properties, FAA must identify the project's "area of potential effects," locate all historic properties listed or eligible for listing on the National Register of Historic Places, and assess the effect of the undertaking on those properties. 36 C.F.R. §§ 800.3(a), 800.4(a)–(c), 800.5. In fulfilling those requirements, FAA "must consult with certain stakeholders in the potentially affected areas, including representatives of local governments." *City of Phoenix*, 869 F.3d at 971; 36 C.F.R. § 800.2(c)(1), (3). If FAA determines that no historic structures will be adversely affected, "it still has to 'notify all consulting parties'"—including the State Historic Preservation Officer and representatives of local governments—"and give them any relevant documentation." *City of Phoenix* 869 F.3d at 971 (quoting 36 C.F.R. § 800.5(c)).

Section 4(f) provides that FAA may approve a project "requiring the use of publicly owned land of a public park, recreation area . . . or land of an historic site of national, State, or local significance . . . only if—(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm . . . resulting from the use." 49 U.S.C. § 303(c). FAA first must "identify as early as practicable in the planning process section 4(f) properties that implementation of the proposed action and alternative(s) could affect." FAA Order 1050.1F app. B, ¶ B-2.1. FAA then makes an "initial assessment . . . to determine whether the proposed action and

alternative(s) would result in the use of any of the properties." *Id.* ¶ B-2.2. "[N]oise that is inconsistent with a parcel of land's continuing to serve its recreational, refuge, or historical purpose is a 'use' of that land." *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994). FAA must consult "all appropriate . . . *local officials* having jurisdiction over the affected Section 4(f) properties" when assessing whether a noise increase might "substantially impair the resources." *See* FAA Order 1050.1F app. B, ¶ B-2.2.2 (emphasis added).

The FAA's interactions regarding NHPA and Section 4(f) have been solely on the effects of west flow departures. AR23-001 (proposed action is "to amend the west flow Area Navigation (RNAV) … procedures…"); AR35-005, 016, 022, 028, 036, 044, 052, 060, 066, 074, 082, 090, 099, 110, 121, 133, 142, 149, 158, 167, 177, and 187 (all of which define the proposed action or undertaking as "air traffic procedure amendments to the west flow RNAV SID procedures from runways 25L, 25R and 26). East flow procedures are not mentioned in any of the NHPA and Section 4(f) interactions and consultations. NHPA and Section 4(f) impose certain requirements on FAA before it amends or modifies flight procedures. FAA has not fulfilled its legal obligations under NHPA and Section 4(f), including consulting with Scottsdale regarding east flow departures.

FAA violated NHPA and Section 4(f) when it issued the January 2020 Final Order ending consideration of east flow revisions to the Replacement Departure

Procedures and thereby allowed the Replacement Departure Procedures to continue without the consultation and analysis required by NHPA and Section 4(f). The record includes no evidence that FAA conducted consultation regarding the potential impact of the east flow flight routes on historic and Section 4(f) properties.

FAA has been on notice that the environmental impacts of the east flow flight routes have not evaluated by FAA as part of its environmental review of the May 2018 Departure Procedures, as required [under NHPA and Section 4(f)]. ER.9. Because FAA relied on its Agreement with Phoenix instead of the Court's Judgment in which FAA focused solely on the west flow departure routes, FAA's consideration of the impact on historic and Section 4(f) properties was limited to the area underlying the west flow departure routes. Although the Court vacated the entire 2014 Departure Procedures, and not just the west flow components of those procedures, FAA has conducted no analysis of east flow flight routes. FAA has failed to conduct this analysis and correct this issue even though the Court in its opinion specifically admonished the FAA to do so. RJN06.

Scottsdale also provided FAA with evidence establishing Section 4(f) resources affected by east flow departure routes. AR83-031. Among those resources, Scottsdale and other parties identified areas such as the McDowell Sonoran Preserve, which encompasses 30,500 acres of permanently protected,

sustainable desert habitats. *Id*. Increased noise due to east flow departures interferes with visitors' enjoyment and threatens the wildlife habitat within the McDowell Sonoran Preserve, constituting a constructive use for Section 4(f). *Id.* FAA has not considered the impact of east flow departures on this particular noise sensitive resource or any others.

FAA has simply ignored the potential impacts that the east flow flight routes may have on NHPA and Section 4(f) properties. When FAA issued the January 2020 Final Order indicating its decision not to review the environmental impacts of the eat flow departure routes, FAA allowed east flow to continue even though FAA was fully aware of a large number of potentially affected resources and properties it had failed to consider, and even though no NHPA or Section 4(f) analysis had been conducted.

The January 2020 Final Order therefore was issued in violation of NHPA and Section 4(f).

IV. Because FAA's "Step Two" Process Failed to Comply with NEPA, NHPA, and Section 4(f), Its Decision to Abandon It Without Complying Is Arbitrary and Capricious.

NEPA "requires federal agencies . . . to consider and report on the environmental effects of their proposed actions." *Wild Earth Guardians v.* Jewell, 738 F.3d 298, 302 (D.C. Cir. 2013). "NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental

impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process." *Balt. Gas & Elec. Co. v.* NRDC, 462 U.S. 87, 97 (1983). As part of Step TWO, FAA presented two proposed actions to the public. Concept One and Concept Two. AR62. FAA asked the public to commend on them. *Id.* However, FAA provided no environmental analysis to allay the public's fears about the environmental impacts of the proposed action. Thus, when FAA issued its January 10, 2020, Decision without complying with NEPA, NHPA and Section 4(f), FAA's decision was arbitrary and capricious. FAA claims that because "during Step Two would have sole discretion whether to make any changes to flight procedures that are unrelated to the westbound departures that were at issue in the [Phoenix] lawsuit," AR61-019-020, it could decide whether it would perform a NEPA environmental analysis. However, the FAA's "sole discretion" is not unfettered discretion. Paragraph 7 of the Agreement sets forth the requirement that the FAA perform its obligations under Step One and Step Two under:

> NEPA, 42 U.S.C. § 4321 et seq.; FAA Order 1050.1F, Environmental Impacts: Policies and Procedures; FAA Order 7100.41, Performance Based Navigation Implementation Process; FAA Order 7400.2L, Procedures for Handling Airspace Matters; Section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. § 470 et seq.; Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303(c); and other applicable federal laws.

AR02-008. Because FAA offers no environmental analysis of Concept One or Concept Two, its Decision to end those proposed action without such analysis was arbitrary and capricious.

FAA has an obligation under these statutes, regulations and orders to environmentally analyze its action in terminating the Step Two process, and "take no further action under Step Two" warrants the Court's review as to whether the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *U.S. Air Tour Ass'n v. F.A.A.*, 298 F.3d 997, 1005 (D.C. Cir. 2002) (citing Administrative Procedure Act, 5 U.S.C. § 706(2)(A)). In other words, the question for the court is "whether the agency has considered the relevant factors and articulated a 'rational connection between the facts found and the choice made.'" *Id*. at 1005. Scottsdale alleges that the FAA has articulated no rational connection and considered the relevant factors.

CONCLUSION AND RELIEF REQUESTED

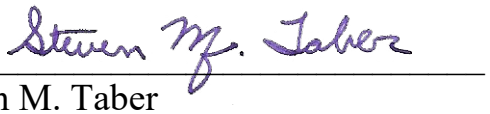
Scottsdale respectfully requests that the Court vacate and remand FAA's decision to implement the Replacement RNAV departure routes and require FAA to (1) adequately consider the noise impacts of the routes and FAA's Concepts One and Two under NEPA, (2) enter into consultation with the proper authorities in compliance with NHPA and Section 4(f), and (3) analyze and determine measures

that could avoid, minimize, or mitigate adverse effects on NHPA and Section 4(f) properties.

Vacatur of FAA's action is appropriate. *See New York v. Nuclear Regulatory Comm'n*, 681 F.3d 471, 473 (D.C. Cir. 2012) (vacating NRC's rulemaking because of deficient NEPA environmental review). Under *Allied-Signal v. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993), a decision to vacate "depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.") (citation and quotation marks omitted). Both *Allied-Signal* factors support vacating FAA's implementation of RNAV routes. First, FAA's knowing failure to consult with the proper authorities under NHPA and Section 4(f), and adequately assess the noise impacts of the east flow RNAV routes, led to an action that, by FAA's own admission, has substantial noise impacts on Scottsdale. FAA's compliance with NHPA, Section 4(f), and NEPA will likely result in a modification of the RNAV routes to address noise impacts. Second, vacatur would not disrupt FAA's operations at the Airport. During FAA's reevaluation of the RNAV routes, FAA can safely and efficiently use the pre-September 18, 2014, arrival and departure flights paths that currently remain in place.

Respectfully submitted on April 26, 2021

LEECH TISHMAN FUSCALDO & LAMPL,

By: 

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petition for Review complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 12,983 words. I further certify that this Petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: April 26, 2021

LEECH TISHMAN FUSCALDO & LAMPL

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the appellate CM/ECF system on April 26, 2021. I certify that all participants are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 26, 2021 LEECH TISHMAN FUSCALDO & LAMPL

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No. 20-1070

ORAL ARGUMENT NOT YET SCHEDULED

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

CITY OF SCOTTSDALE, Arizona
Petitioner
v.

FEDERAL AVIATION ADMINISTRATION, and STEPHEN M. DICKSON, in his official capacity as Administrator, Federal Aviation Administration
Respondents

ADDENDUM TO PETITIONER CITY OF SCOTTSDALE'S OPENING BRIEF

(Volume 1 –pp. A001 – A041)

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ADDENDUM A

STATUTES, REGULATIONS AND OTHER AUTHORITIES

STATUTES

REGULATIONS

FAA ORDERS

Respectfully submitted on April 26, 2021.

Dated: April 26, 2021 LEECH TISHMAN FUSCALDO & LAMPL, INC.

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5 USCS § 551

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 5. Administrative Procedure (Subchs. I — V) > Subchapter II. Administrative Procedure (§§ 551 — 559)

§ 551. Definitions

For the purpose of this subchapter [*5 USCS §§ 551* et seq.]—

(1)"agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A)the Congress;

(B)the courts of the United States;

(C)the governments of the territories or possessions of the United States;

(D)the government of the District of Columbia;

or except as to the requirements of section 552 of this title [*5 USCS § 552*]—

(E)agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F)courts martial and military commissions;

(G)military authority exercised in the field in time of war or in occupied territory; or

(H)functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49 [*49 USCS §§ 47151* et seq.]; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix;

(2)"person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3)"party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4)"rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5)"rule making" means agency process for formulating, amending, or repealing a rule;

(6)"order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7)"adjudication" means agency process for the formulation of an order;

(8)"license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9)"licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10)"sanction" includes the whole or a part of an agency—

(A)prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B)withholding of relief;

(C)imposition of penalty or fine;

(D)destruction, taking, seizure, or withholding of property;

(E)assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F)requirement, revocation, or suspension of a license; or

(G)taking other compulsory or restrictive action;

(11)"relief" includes the whole or a part of an agency—

(A)grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B)recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C)taking of other action on the application or petition of, and beneficial to, a person;

(12)"agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13)"agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14)"ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter [*5 USCS §§ 551* etc.].

History

HISTORY:

Act Sept. 6, 1966, *P. L. 89-554*, § 1, *80 Stat. 381*; Sept. 13, 1976, *P. L. 94-409*, § 4(b), *90 Stat. 1247*; July 5, 1994, *P. L. 103-272*, § 5(a), *108 Stat. 1373*; Jan. 4, 2011, *P. L. 111-350*, § 5(a)(2), *124 Stat. 3841*.

End of Document

5 USCS § 706, Part 1 of 4

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 7. Judicial Review (§§ 701 — 706)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1)compel agency action unlawfully withheld or unreasonably delayed; and

(2)hold unlawful and set aside agency action, findings, and conclusions found to be—

(A)arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B)contrary to constitutional right, power, privilege, or immunity;

(C)in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D)without observance of procedure required by law;

(E)unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [*5 USCS §§ 556* and *557*] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F)unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

History

HISTORY:

Act Sept. 6, 1966, *P. L. 89-554*, § 1, *80 Stat. 393*.

End of Document

42 USCS § 4332, Part 1 of 2

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 161) > CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY (§§ 4321 — 4370m-12) > POLICIES AND GOALS (§§ 4331 — 4335)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [*42 USCS §§ 4321* et seq.], and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [*42 USCS §§ 4341* et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by *section 552 of title 5, United States Code*, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii)the responsible Federal official furnishes guidance and participates in such preparation,

(iii)the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv)after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [*42 USCS §§ 4321* et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [;]

(E)study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F)recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G)make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H)initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I)assist the Council on Environmental Quality established by title II of this Act [*42 USCS §§ 4341* et seq.].

History

HISTORY:

Act Jan. 1, 1970, *P. L. 91-190*, Title I, § 102, *83 Stat. 853*; Aug. 9, 1975, *P. L. 94-83*, *89 Stat. 424*.

End of Document

49 USCS § 303

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle I. Department of Transportation (Chs. 1 — 7) > CHAPTER 3. General Duties and Power (Subchs. I — III) > Subchapter I. Duties of The Secretary of Transportation (§§ 301 — 312)

§ 303. Policy on lands, wildlife and waterfowl refuges, and historic sites

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.

(b) The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States, in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of lands crossed by transportation activities or facilities.

(c) Approval of programs and projects. Subject to subsections (d) and (h), the Secretary may approve a transportation program or project (other than any project for a park road or parkway under section 204 of title 23) requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if—

(1)there is no prudent and feasible alternative to using that land; and

(2)the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

(d) De minimis impacts.

(1) Requirements.

(A) Requirements for historic sites. The requirements of this section shall be considered to be satisfied with respect to an area described in paragraph (2) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area.

(B) Requirements for parks, recreation areas, and wildlife or waterfowl refuges. The requirements of subsection (c)(1) shall be considered to be satisfied with respect to an area described in paragraph (3) if the Secretary determines, in accordance with this subsection, that a transportation program or project will have a de minimis impact on the area. The requirements of subsection (c)(2) with respect to an area described in paragraph (3) shall not include an alternatives analysis.

(C) Criteria. In making any determination under this subsection, the Secretary shall consider to be part of a transportation program or project any avoidance, minimization, mitigation, or enhancement measures that are required to be implemented as a condition of approval of the transportation program or project.

(2) Historic sites. With respect to historic sites, the Secretary may make a finding of de minimis impact only if—

(A)the Secretary has determined, in accordance with the consultation process required under *section 306108 of title 54, United States Code*, that—

(i)the transportation program or project will have no adverse effect on the historic site; or

(ii)there will be no historic properties affected by the transportation program or project;

(B)the finding of the Secretary has received written concurrence from the applicable State historic preservation officer or tribal historic preservation officer (and from the Advisory Council on Historic Preservation if the Council is participating in the consultation process); and

(C)the finding of the Secretary has been developed in consultation with parties consulting as part of the process referred to in subparagraph (A).

(3) Parks, recreation areas, and wildlife or waterfowl refuges. With respect to parks, recreation areas, or wildlife or waterfowl refuges, the Secretary may make a finding of de minimis impact only if—

(A)the Secretary has determined, after public notice and opportunity for public review and comment, that the transportation program or project will not adversely affect the activities, features, and attributes of the park, recreation area, or wildlife or waterfowl refuge eligible for protection under this section; and

(B)the finding of the Secretary has received concurrence from the officials with jurisdiction over the park, recreation area, or wildlife or waterfowl refuge.

(e) Satisfaction of requirements for certain historic sites.

(1) In general. The Secretary shall—

(A)align, to the maximum extent practicable, the requirements of this section with the requirements of the National Environmental Policy Act of 1969 (*42 U.S.C. 4321* et seq.) and section 306108 of title 54 [*54 USCS § 306108*], including implementing regulations; and

(B)not later than 90 days after the date of enactment of this subsection [enacted Dec. 4, 2015], coordinate with the Secretary of the Interior and the Executive Director of the Advisory Council on Historic Preservation (referred to in this subsection as the "Council") to establish procedures to satisfy the requirements described in subparagraph (A) (including regulations).

(2) Avoidance alternative analysis.

(A) In general. If, in an analysis required under the National Environmental Policy Act of 1969 (*42 U.S.C. 4321* et seq.), the Secretary determines that there is no feasible or prudent alternative to avoid use of a historic site, the Secretary may—

(i)include the determination of the Secretary in the analysis required under that Act [*42 USCS §§ 4321* et seq.];

(ii)provide a notice of the determination to—

(I)each applicable State historic preservation officer and tribal historic preservation officer;

(II)the Council, if the Council is participating in the consultation process under section 306108 of title 54 [*54 USCS § 306108*]; and

(III)the Secretary of the Interior; and

(iii)request from the applicable preservation officer, the Council, and the Secretary of the Interior a concurrence that the determination is sufficient to satisfy subsection (c)(1).

(B) Concurrence. If the applicable preservation officer, the Council, and the Secretary of the Interior each provide a concurrence requested under subparagraph (A)(iii), no further analysis under subsection (c)(1) shall be required.

(C) Publication. A notice of a determination, together with each relevant concurrence to that determination, under subparagraph (A) shall—

(i)be included in the record of decision or finding of no significant impact of the Secretary; and

(ii)be posted on an appropriate Federal website by not later than 3 days after the date of receipt by the Secretary of all concurrences requested under subparagraph (A)(iii).

(3) Aligning historical reviews.

(A) In general. If the Secretary, the applicable preservation officer, the Council, and the Secretary of the Interior concur that no feasible and prudent alternative exists as described in paragraph (2), the Secretary may provide to the applicable preservation officer, the Council, and the Secretary of the Interior notice of the intent of the Secretary to satisfy subsection (c)(2) through the consultation requirements of section 306108 of title 54 [*54 USCS § 306108*].

(B) Satisfaction of conditions. To satisfy subsection (c)(2), the applicable preservation officer, the Council, and the Secretary of the Interior shall concur in the treatment of the applicable historic site described in the memorandum of agreement or programmatic agreement developed under section 306108 of title 54 [*54 USCS § 306108*].

(f) References to past transportation environmental authorities.

(1) Section 4(f) requirements. The requirements of this section are commonly referred to as section 4(f) requirements (see section 4(f) of the Department of Transportation Act (*Public Law 89-670*; *80 Stat. 934*) as in effect before the repeal of that section).

(2) Section 106 requirements. The requirements of section 306108 of title 54 [*54 USCS § 306108*] are commonly referred to as section 106 requirements (see section 106 of the National Historic Preservation Act of 1966 (*Public Law 89-665*; *80 Stat. 917*) as in effect before the repeal of that section).

(g) Bridge exemption from consideration. A common post-1945 concrete or steel bridge or culvert (as described in *77 Fed. Reg. 68790*) that is exempt from individual review under section 306108 of title 54 [*54 USCS § 306108*] shall be exempt from consideration under this section.

(h) Rail and transit.

(1) In general. Improvements to, or the maintenance, rehabilitation, or operation of, railroad or rail transit lines or elements thereof that are in use or were historically used for the transportation of goods or passengers shall not be considered a use of a historic site under subsection (c), regardless of whether the railroad or rail transit line or element thereof is listed on, or eligible for listing on, the National Register of Historic Places.

(2) Exceptions.

(A) In general. Paragraph (1) shall not apply to—

(i)stations; or

(ii)bridges or tunnels located on—

(I)railroad lines that have been abandoned; or

(II)transit lines that are not in use.

(B) Clarification with respect to certain bridges and tunnels. The bridges and tunnels referred to in subparagraph (A)(ii) do not include bridges or tunnels located on railroad or transit lines—

(i)over which service has been discontinued; or

(ii)that have been railbanked or otherwise reserved for the transportation of goods or passengers.

History

HISTORY:

Act Jan. 12, 1983, P. L. 97-449, § 1(b), 96 Stat. 2419; April 2, 1987, P. L. 100-17, Title I, § 133(d), 101 Stat. 173; Aug. 10, 2005, *P. L. 109-59*, Title VI, § 6009(a)(2), *119 Stat. 1875*; Dec. 19, 2014, *P. L. 113-287*, § 5(p), *128 Stat. 3272*; Dec. 4, 2015, *P. L. 114-94*, Div A, Title I, Subtitle C, §§ 1301(b), 1302(b), 1303(b), Title XI, Subtitle E, § 11502(b), *129 Stat. 1376*, 1377, 1378, 1690.

End of Document

49 USCS § 46110

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle VII. Aviation Programs (Pts. A — E) > Part A. Air Commerce and Safety (Subpts. I — IV) > Subpart IV. Enforcement and Penalties (Chs. 461 — 465) > CHAPTER 461. Investigations and Proceedings (§§ 46101 — 46111)

§ 46110. Judicial review

(a) Filing and venue. Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title [*49 USCS § 41307* or *41509(f)*], a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Administrator of the Transportation Security Administration with respect to security duties and powers designated to be carried out by the Administrator of the Transportation Security Administration or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator of the Federal Aviation Administration) in whole or in part under this part [*49 USCS §§ 40101* et seq.], part B [*49 USCS §§ 47101* et seq.], or subsection (l) or (s) of section 114 [*49 USCS § 114*] may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures. When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, as appropriate. The Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28 [*28 USCS § 2112*].

(c) Authority of court. When the petition is sent to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration to conduct further proceedings. After reasonable notice to the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection. In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration only if the objection was made in the proceeding conducted by the Secretary, Administrator of the Transportation Security Administration, or Administrator of the Federal Aviation Administration or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review. A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

History

HISTORY:

Act July 5, 1994, *P. L. 103-272*, § 1(e), *108 Stat. 1230*; Nov. 19, 2001, *P. L. 107-71*, Title I, § 140(b)(1), (2), *115 Stat. 641*; Dec. 12, 2003, *P. L. 108-176*, Title II, Subtitle B, § 228, *117 Stat. 2532*; Oct. 5, 2018, *P.L. 115-254*, Div K, Title I, Subtitle I, § 1991(f)(1)-(4), *132 Stat. 3642*.

End of Document

54 USCS § 300101

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 54. NATIONAL PARK SERVICE AND RELATED PROGRAMS (§§ 100101 — 320303) > Subtitle III. National Preservation Programs (§§ 300101 — 320303) > Division A. Historic Preservation (Subpts. 1 — 6) > Subdivision 1. General Provisions (Chs. 3001 — 3003) > CHAPTER 3001. Policy (§ 300101)

§ 300101. Policy

It is the policy of the Federal Government, in cooperation with other nations and in partnership with States, local governments, Indian tribes, Native Hawaiian organizations, and private organizations and individuals, to—

(1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;

(2) provide leadership in the preservation of the historic property of the United States and of the international community of nations and in the administration of the national preservation program;

(3) administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;

(4) contribute to the preservation of nonfederally owned historic property and give maximum encouragement to organizations and individuals undertaking preservation by private means;

(5) encourage the public and private preservation and utilization of all usable elements of the Nation's historic built environment; and

(6) assist State and local governments, Indian tribes and Native Hawaiian organizations, and the National Trust to expand and accelerate their historic preservation programs and activities.

History

HISTORY:

Act Dec. 19, 2014, *P. L. 113-287*, § 3, *128 Stat. 3187*.

End of Document

54 USCS § 306108

Current through Public Law 116-344, approved January 13, 2021, with a gap of Public Law 116-283.

United States Code Service > TITLE 54. NATIONAL PARK SERVICE AND RELATED PROGRAMS (§§ 100101 — 320303) > Subtitle III. National Preservation Programs (§§ 300101 — 320303) > Division A. Historic Preservation (Subpts. 1 — 6) > Subdivision 5. Federal Agency Historic Preservation Responsibilities (Ch. 3061) > CHAPTER 3061. Program Responsibilities and Authorities (Subchs. I — III) > Subchapter I. In General (§§ 306101 — 306114)

§ 306108. Effect of undertaking on historic property

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.

History

HISTORY:

Act Dec. 19, 2014, *P. L. 113-287*, § 3, *128 Stat. 3227*.

End of Document

36 CFR 800.1

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart A — Purposes and Participants

§ 800.1 Purposes.

(a) Purposes of the section 106 process. Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

(b) Relation to other provisions of the act. Section 106 is related to other provisions of the act designed to further the national policy of historic preservation. References to those provisions are included in this part to identify circumstances where they may affect actions taken to meet section 106 requirements. Such provisions may have their own implementing regulations or guidelines and are not intended to be implemented by the procedures in this part except insofar as they relate to the section 106 process. Guidelines, policies, and procedures issued by other agencies, including the Secretary, have been cited in this part for ease of access and are not incorporated by reference.

(c) Timing. The agency official must complete the section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking’s adverse effects on historic properties. The agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27071, May 18, 1999; *65 FR 77698*, 77725, Dec. 12, 2000]

36 CFR 800.2

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart A — Purposes and Participants

§ 800.2 Participants in Section 106 process.

(a) Agency official. It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance in accordance with subpart B of this part. The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance. For the purposes of subpart C of this part, the agency official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The agency official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law.

(1) Professional standards. Section 112(a)(1)(A) of the act requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary.

(2) Lead Federal agency. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part.

(3) Use of contractors. Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) Consultation. The agency official shall involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process. The agency official should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation. The Council encourages the agency official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

(b) Council. The Council issues regulations to implement section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the section 106 process. The Council also consults with and comments to agency officials on individual undertakings and programs that affect historic properties.

(1) Council entry into the section 106 process. When the Council determines that its involvement is necessary to ensure that the purposes of section 106 and the act are met, the Council may enter the section 106 process. Criteria guiding Council decisions to enter the section 106 process are found in appendix A to this part. The Council will document that the criteria have been met and notify the parties to the section 106 process as required by this part.

(2) Council assistance. Participants in the section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

(c) Consulting parties. The following parties have consultative roles in the section 106 process.

(1) State historic preservation officer.

(i) The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the act, the SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.

(ii) If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with § 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to § 800.3(f)(3).

(2) Indian tribes and Native Hawaiian organizations.

(i) Consultation on tribal lands.

(A) Tribal historic preservation officer. For a tribe that has assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the tribal historic preservation officer (THPO) appointed or designated in accordance with the act is the official representative for the purposes of section 106. The agency official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(B) Tribes that have not assumed SHPO functions. When an Indian tribe has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act, the agency official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands. Such Indian tribes have the same rights of consultation and concurrence that the THPOs are given throughout subpart B of this part, except that such consultations shall be in addition to and on the same basis as consultation with the SHPO.

(ii) Consultation on historic properties of significance to Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the agency official to make a reasonable and good faith effort to identify

Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies, or limits the exercise of any such rights.

(C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(D) When Indian tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes and Native Hawaiian organizations and should consider that when complying with the procedures in this part.

(E) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process beyond those specified in subpart B of this part. The agency official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(F) An Indian tribe that has not assumed the responsibilities of the SHPO for section 106 on tribal lands under section 101(d)(2) of the act may notify the agency official in writing that it is waiving its rights under § 800.6(c)(1) to execute a memorandum of agreement.

(3) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

(4) Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants t of apiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes.

(5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

(d) The public.

(1) Nature of involvement. The views of the public are essential to informed Federal decisionmaking in the section 106 process. The agency official shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

(2) Providing notice and information. The agency official must, except where appropriate to protect confidentiality concerns of affected parties, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the agency official to consider in decisionmaking.

(3) Use of agency procedures. The agency official may use the agency's procedures for public involvement under the National Environmental Policy Act or other program requirements in lieu of public involvement requirements in subpart B of this part, if they provide adequate opportunities for public involvement consistent with this subpart.

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27071, May 18, 1999; *65 FR 77698*, 77726, Dec. 12, 2000]

End of Document

36 CFR 800.3

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart B — The Section 106 Process

§ 800.3 Initiation of the section 106 process.

(a) Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

(1) No potential to cause effects. If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency official has no further obligations under section 106 or this part.

(2) Program alternatives. If the review of the undertaking is governed by a Federal agency program alternative established under § 800.14 or a programmatic agreement in existence before January 11, 2001, the agency official shall follow the program alternative.

(b) Coordinate with other reviews. The agency official should coordinate the steps of the section 106 process, as appropriate, with the overall planning schedule for the undertaking and with any reviews required under other authorities such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, and agency-specific legislation, such as section 4(f) of the Department of Transportation Act. Where consistent with the procedures in this subpart, the agency official may use information developed for other reviews under Federal, State, or tribal law to meet the requirements of section 106.

(c) Identify the appropriate SHPO and/or THPO. As part of its initial planning, the agency official shall determine the appropriate SHPO or SHPOs to be involved in the section 106 process. The agency official shall also determine whether the undertaking may occur on or affect historic properties on any tribal lands and, if so, whether a THPO has assumed the duties of the SHPO. The agency official shall then initiate consultation with the appropriate officer or officers.

(1) Tribal assumption of SHPO responsibilities. Where an Indian tribe has assumed the section 106 responsibilities of the SHPO on tribal lands pursuant to section 101(d)(2) of the act, consultation for undertakings occurring on tribal land or for effects on tribal land is with the THPO for the Indian tribe in lieu of the SHPO. Section 101(d)(2)(D)(iii) of the act authorizes owners of properties on tribal lands which are neither owned by a member of the tribe nor held in trust by the Secretary for the benefit of the tribe to request the SHPO to participate in the section 106 process in addition to the THPO.

(2) Undertakings involving more than one State. If more than one State is involved in an undertaking, the involved SHPOs may agree to designate a lead SHPO to act on their behalf in the section 106 process, including taking actions that would conclude the section 106 process under this subpart.

(3) Conducting consultation. The agency official should consult with the SHPO/THPO in a manner appropriate to the agency planning process for the undertaking and to the nature of the undertaking and its effects on historic properties.

(4) Failure of the SHPO/THPO to respond. If the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next

step in the process based on the finding or determination or consult with the Council in lieu of the SHPO/THPO. If the SHPO/THPO re-enters the Section 106 process, the agency official shall continue the consultation without being required to reconsider previous findings or determinations.

(d) Consultation on tribal lands. Where the Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, consultation with the Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands shall be in addition to and on the same basis as consultation with the SHPO. If the SHPO has withdrawn from the process, the agency official may complete the section 106 process with the Indian tribe and the Council, as appropriate. An Indian tribe may enter into an agreement with a SHPO or SHPOs specifying the SHPO's participation in the section 106 process for undertakings occurring on or affecting historic properties on tribal lands.

(e) Plan to involve the public. In consultation with the SHPO/THPO, the agency official shall plan for involving the public in the section 106 process. The agency official shall identify the appropriate points for seeking public input and for notifying the public of proposed actions, consistent with § 800.2(d).

(f) Identify other consulting parties. In consultation with the SHPO/THPO, the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process. The agency official may invite others to participate as consulting parties as the section 106 process moves forward.

(1) Involving local governments and applicants. The agency official shall invite any local governments or applicants that are entitled to be consulting parties under § 800.2(c).

(2) Involving Indian tribes and Native Hawaiian organizations. The agency official shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party shall be one.

(3) Requests to be consulting parties. The agency official shall consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.

(g) Expediting consultation. A consultation by the agency official with the SHPO/THPO and other consulting parties may address multiple steps in §§ 800.3 through 800.6 where the agency official and the SHPO/THPO agree it is appropriate as long as the consulting parties and the public have an adequate opportunity to express their views as provided in § 800.2(d).

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27073, May 18, 1999; *65 FR 77698*, 77728, Dec. 12, 2000]

End of Document

36 CFR 800.4

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart B — The Section 106 Process

§ 800.4 Identification of historic properties.

(a) Determine scope of identification efforts. In consultation with the SHPO/THPO, the agency official shall:

(1) Determine and document the area of potential effects, as defined in § 800.16(d);

(2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites. The agency official should address concerns raised about confidentiality pursuant to § 800.11(c).

(b) Identify historic properties. Based on the information gathered under paragraph (a) of this section, and in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

(1) Level of effort. The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. The agency official shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects. The Secretary's standards and guidelines for identification provide guidance on this subject. The agency official should also consider other applicable professional, State, tribal, and local laws, standards, and guidelines. The agency official shall take into account any confidentiality concerns raised by Indian tribes or Native Hawaiian organizations during the identification process.

(2) Phased identification and evaluation. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background

research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the SHPO/THPO and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

(c) Evaluate historic significance.

(1) Apply National Register criteria. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified properties and guided by the Secretary's standards and guidelines for evaluation, the agency official shall apply the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.

(2) Determine whether a property is eligible. If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

(d) Results of identification and evaluation.

(1) No historic properties affected. If the agency official finds that either there are no historic properties present or there are historic properties present but the undertaking will have no effect upon them as defined in § 800.16(i), the agency official shall provide documentation of this finding, as set forth in § 800.11(d), to the SHPO/THPO. The agency official shall notify all consulting parties, including Indian tribes and Native Hawaiian organizations, and make the documentation available for public inspection prior to approving the undertaking.

(i) If the SHPO/THPO, or the Council if it has entered the section 106 process, does not object within 30 days of receipt of an adequately documented finding, the agency official's responsibilities under section 106 are fulfilled.

(ii) If the SHPO/THPO objects within 30 days of receipt of an adequately documented finding, the agency official shall either consult with the objecting party to resolve the disagreement, or forward the finding and supporting documentation to the Council and request that the Council review the finding pursuant to paragraphs (d)(1)(iv)(A) through (d)(1)(iv)(C) of this section. When an agency official forwards such requests for review to the Council, the agency official shall concurrently notify all consulting parties that such a request has been made and make the request documentation available to the public.

(iii) During the SHPO/THPO 30 day review period, the Council may object to the finding and provide its opinion regarding the finding to the agency official and, if the Council determines the issue warrants it, the head of the agency. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The agency shall then proceed according to paragraphs (d)(1)(iv)(B) and (d)(1)(iv)(C) of this section.

(iv)

(A) Upon receipt of the request under paragraph (d)(1)(ii) of this section, the Council will have 30 days in which to review the finding and provide the agency official and, if the Council

determines the issue warrants it, the head of the agency with the Council's opinion regarding the finding. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. If the Council does not respond within 30 days of receipt of the request, the agency official's responsibilities under section 106 are fulfilled.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion before the agency reaches a final decision on the finding.

(C) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall then prepare a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial agency finding of no historic properties affected, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(D) The Council shall retain a record of agency responses to Council opinions on their findings of no historic properties affected. The Council shall make this information available to the public.

(2) Historic properties affected. If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties, including Indian tribes or Native Hawaiian organizations, invite their views on the effects and assess adverse effects, if any, in accordance with § 800.5.

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27074, May 18, 1999; *65 FR 77698*, 77728, Dec. 12, 2000; *69 FR 40544*, 40553, July 6, 2004]

End of Document

36 CFR 800.5

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 36 Parks, Forests, and Public Property > Chapter VIII — Advisory Council on Historic Preservation > Part 800 — Protection of Historic Properties > Subpart B — The Section 106 Process

§ 800.5 Assessment of adverse effects.

(a) Apply criteria of adverse effect. In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) Examples of adverse effects. Adverse effects on historic properties include, but are not limited to:

(i) Physical destruction of or damage to all or part of the property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines;

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;

(v) Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

(3) Phased application of criteria. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to § 800.4(b)(2).

(b) Finding of no adverse effect. The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) Consulting party review. If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in § 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) Agreement with, or no objection to, finding. Unless the Council is reviewing the finding pursuant to papagraph (c)(3) of this section, the agency official may proceed after the close of the 30 day review period if the SHPO/THPO has agreed with the finding or has not provided a response, and no consulting party has objected. The agency official shall then carry out the undertaking in accordance with paragraph (d)(1) of this section.

(2) Disagreement with finding.

(i) If within the 30 day review period the SHPO/THPO or any consulting party notifies the agency official in writing that it disagrees with the finding and specifies the reasons for the disagreement in the notification, the agency official shall either consult with the party to resolve the disagreement, or request the Council to review the finding pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section. The agency official shall include with such request the documentation specified in § 800.11(e). The agency official shall also concurrently notify all consulting parties that such a submission has been made and make the submission documentation available to the public.

(ii) If within the 30 day review period the Council provides the agency official and, if the Council determines the issue warrants it, the head of the agency, with a written opinion objecting to the finding, the agency shall then proceed according to paragraph (c)(3)(ii) of this section. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part.

(iii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30 day review period specify the reasons for disagreeing with the finding and request the Council to review and object to the finding pursuant to paragraph (c)(2)(ii) of this section.

(3) Council review of findings.

(i) When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of this section, the Council shall review the finding and provide the agency official and, if the Council determines the issue warrants it, the head of the agency with its opinion as to whether the adverse effect criteria have been correctly applied. A Council decision to provide its opinion to the head of an agency shall be guided by the criteria in appendix A to this part. The Council will provide its opinion within 15 days of receiving the documented finding from the agency official. The Council at its discretion may extend that time period for 15 days, in which case it shall notify the agency of such extension prior to the end of the initial 15 day period. If the Council does not respond within the applicable time period, the agency official's responsibilities under section 106 are fulfilled.

(ii)

(A) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall take into account the Council's opinion in reaching a final decision on the finding.

(B) The person to whom the Council addresses its opinion (the agency official or the head of the agency) shall prepare a summary of the decision that contains the rationale for the decision

and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the consulting parties. The head of the agency may delegate his or her duties under this paragraph to the agency's senior policy official. If the agency official's initial finding will be revised, the agency official shall proceed in accordance with the revised finding. If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.

(C) The Council shall retain a record of agency responses to Council opinions on their findings of no adverse effects. The Council shall make this information available to the public.

(d) Results of assessment.

(1) No adverse effect. The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of § 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under section 106 and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) Adverse effect. If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to § 800.6.

Statutory Authority

Authority Note Applicable to Title 36, Ch. VIII, Pt. 800

History

[51 FR 31118, Sept. 2, 1986; *64 FR 27044*, 27075, May 18, 1999; *65 FR 77698*, 77729, Dec. 12, 2000; *69 FR 40544*, 40553, July 6, 2004]

End of Document

40 CFR 1501.2

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 40 Protection of Environment > Chapter V — Council on Environmental Quality > Subchapter A — National Environmental Policy Act Implementing Regulations > Part 1501 — Nepa and Agency Planning

Notice

. This section has more than one version with varying effective dates.

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (*42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended (*42 U.S.C. 7609*, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Authority Note Applicable to Title 40, Ch. V, Pt. 1501

History

43 FR 55992, Nov. 29, 1978; *85 FR 43304*, 43359, July 16, 2020]

End of Document

40 CFR 1501.3

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 40 Protection of Environment > Chapter V — Council on Environmental Quality > Subchapter A — National Environmental Policy Act Implementing Regulations > Part 1501 — Nepa and Agency Planning

Notice

. This section has more than one version with varying effective dates.

§ 1501.3 Determine the appropriate level of NEPA review. [See Publisher's Note for the effective date.]

[PUBLISHER'S NOTE: 85 FR 43304, 43359, July 16, 2020, which revised Part 1501, provides: "This is a major rule subject to congressional review. The effective date is September 14, 2020. However, if congressional review has changed the effective date, CEQ will publish a document in the Federal Register to establish the actual effective date or to terminate the rule."]

(a) In assessing the appropriate level of NEPA review, Federal agencies should determine whether the proposed action:

(1) Normally does not have significant effects and is categorically excluded (§ 1501.4);

(2) Is not likely to have significant effects or the significance of the effects is unknown and is therefore appropriate for an environmental assessment (§ 1501.5); or

(3) Is likely to have significant effects and is therefore appropriate for an environmental impact statement (part 1502 of this chapter).

(b) In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action. Agencies should consider connected actions consistent with § 1501.9(e)(1).

(1) In considering the potentially affected environment, agencies should consider, as appropriate to the specific action, the affected area (national, regional, or local) and its resources, such as listed species and designated critical habitat under the Endangered Species Act. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend only upon the effects in the local area.

(2) In considering the degree of the effects, agencies should consider the following, as appropriate to the specific action:

(i) Both short- and long-term effects.

(ii) Both beneficial and adverse effects.

(iii) Effects on public health and safety.

(iv) Effects that would violate Federal, State, Tribal, or local law protecting the environment.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (*42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended (*42 U.S.C. 7609*, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Authority Note Applicable to Title 40, Ch. V, Pt. 1501

History

43 FR 55992, Nov. 29, 1978; *85 FR 43304*, 43359, July 16, 2020]

End of Document

40 CFR 1501.4

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 40 Protection of Environment > Chapter V — Council on Environmental Quality > Subchapter A — National Environmental Policy Act Implementing Regulations > Part 1501 — Nepa and Agency Planning

Notice

. This section has more than one version with varying effective dates.

§ 1501.4 Categorical exclusions. [See Publisher's Note for the effective date.]

[PUBLISHER'S NOTE: *85 FR 43304*, 43359, July 16, 2020, which revised Part 1501, provides: "This is a major rule subject to congressional review. The effective date is September 14, 2020. However, if congressional review has changed the effective date, CEQ will publish a document in the Federal Register to establish the actual effective date or to terminate the rule."]

(a) For efficiency, agencies shall identify in their agency NEPA procedures (§ 1507.3(e)(2)(ii) of this chapter) categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.

(b) If an agency determines that a categorical exclusion identified in its agency NEPA procedures covers a proposed action, the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect.

(1) If an extraordinary circumstance is present, the agency nevertheless may categorically exclude the proposed action if the agency determines that there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects.

(2) If the agency cannot categorically exclude the proposed action, the agency shall prepare an environmental assessment or environmental impact statement, as appropriate.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (*42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended (*42 U.S.C. 7609*, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

Authority Note Applicable to Title 40, Ch. V, Pt. 1501

History

43 FR 55992, Nov. 29, 1978; *85 FR 43304*, 43359, July 16, 2020]

40 CFR 1508.4

This document is current through the April 21, 2021 issue of the Federal Register, with the exception of the amendments appearing at 86 FR 20633 and 86 FR 21082.

Code of Federal Regulations > Title 40 Protection of Environment > Chapter V — Council on Environmental Quality > Subchapter A — National Environmental Policy Act Implementing Regulations > Part 1508 — Terminology and Index

§ 1508.4 Categorical exclusion.

"Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in § 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Statutory Authority

NEPA, the Environmental Quality Improvement Act of 1970, as amended (*42 U.S.C. 4371* et seq.), sec. 309 of the Clean Air Act, as amended (*42 U.S.C. 7609*), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

History

43 FR 56003, Nov. 29, 1978.

End of Document

Chapter 3: Levels of National Environmental Policy Act Review

3-1. Three Levels of National Environmental Policy Act Review. Once the FAA determines that NEPA applies to a proposed action, it needs to decide on the appropriate level of review. The three levels of NEPA review are Categorical Exclusion (CATEX), Environmental Assessment (EA), and Environmental Impact Statement (EIS). Each of the three levels of review is briefly described in the following paragraphs.

3-1.1. Categorically Excluded Actions. A CATEX refers to a category of actions that do not individually or cumulatively have a significant effect on the human environment, and for which, neither an EA nor an EIS is required. A CATEX is not an exemption or waiver of NEPA review; it is a level of NEPA review. If a proposed action falls within the scope of a CATEX (see Paragraph 5-6, The Federal Aviation Administration's Categorical Exclusions), and there are no extraordinary circumstances (see Paragraph 5-2, Extraordinary Circumstances), an EA or EIS is not required. The FAA may, at its discretion, decide to prepare an EA in order to assist agency planning and decision-making even if a proposed action fits within a CATEX and extraordinary circumstances do not exist, except for actions subject to categorical exclusion under Section 213 of the FAA Modernization and Reform Act (see Paragraphs 5-6.5.q and 5-6.5.r).

3-1.2. Actions Normally Requiring an Environmental Assessment. The purpose of an EA is to determine whether a proposed action has the potential to significantly affect the human environment (see Paragraph 4-3 for more information on determining significance). An EA is a concise public document that briefly provides sufficient evidence and analysis for determining whether to prepare an EIS or a FONSI. An EA may facilitate the preparation of an EIS, when one is necessary.

a. Environmental Assessments. An EA, at a minimum, must be prepared when the proposed action does not normally require an EIS (see Paragraph 3-1.3, Actions Normally Requiring an Environmental Impact Statement) and:

(1) does not fall within the scope of a CATEX (see Paragraph 5-6, The Federal Aviation Administration's Categorical Exclusions); or

(2) falls within the scope of a CATEX, but there are one or more extraordinary circumstances (see Paragraph 5-2, Extraordinary Circumstances).

b. Examples. The following FAA actions normally require an EA:

(1) Acquisition of land greater than three acres for, and the construction of, new office buildings and essentially similar FAA facilities.

(2) Issuance of certificates for new, amended, or supplemental aircraft types for which (a) environmental regulations have not been issued; or (b) new, amended, or supplemental engine types for which emission regulations have not been issued; or (c) where a NEPA analysis has not been prepared in connection with a regulatory action.

(3) Establishment of aircraft/avionics maintenance bases to be operated by the FAA.

(4) Authorization to exceed Mach 1 flight under 14 CFR § 91.817, *Civil Aircraft Sonic Boom*.

(5) Establishment of FAA housing, sanitation systems, fuel storage and distribution systems, and power source and distribution systems.

(6) Establishment or relocation of facilities such as Air Route Traffic Control Centers (ARTCC), Airport Traffic Control Towers (ATCT), and off-airport Air Route Surveillance Radars (ARSR), Air Traffic Control Beacons (ATCB), and Next Generation Radar (NEXRAD).

(7) Establishment, relocation, or construction of facilities used for communications (except as provided under Paragraph 5-6.3a) and navigation that are not on airport property.

(8) Establishment or relocation of instrument landing systems (ILS).

(9) Establishment or relocation of approach lighting systems (ALS) that are not on airport property.

(10) Unconditional Airport Layout Plan (ALP) approval of, or Federal financial participation in, the following categories of airport actions:

(a) Location of a new airport that would serve only general aviation;

(b) Location of a new commercial service airport that would not be located in a Metropolitan Statistical Area (MSA);

(c) A new runway at an existing airport that is not located in an MSA;

(d) Runway strengthening having the potential to significantly increase off-airport noise impacts (see Exhibit 4-1);

(e) Construction or relocation of entrance or service road connections to public roads that substantially reduce the level of service rating of such public roads below the acceptable level determined by the appropriate transportation agency (i.e., a highway agency); and

(f) Land acquisition associated with any of the items in (10)(a)–(f).

(11) Approval of operations specifications or amendments that may significantly change the character of the operational environment of an airport, including, but not limited to:

(a) Approval of operations specifications authorizing an operator to use aircraft to provide scheduled passenger or cargo service at an airport that may cause significant impacts to noise, air quality, or other environmental impact categories (see Exhibit 4-1); or

(b) Amendment of operations specifications authorizing an operator to serve an airport with different aircraft that may cause significant impacts to noise, air quality, or other environmental impact categories (see Exhibit 4-1).

(12) New air traffic control procedures (e.g., instrument approach procedures, departure procedures, en route procedures) and modifications to currently approved procedures that routinely route aircraft over noise sensitive areas at less than 3,000 feet above ground level (AGL) (unless otherwise categorically excluded under Paragraphs (procedures category) 5-6.5q and 5-6.5r).

(13) Establishment or modification of an Instrument Flight Rules Military Training Route (IR MTR).

(14) Special Use Airspace (SUA) (unless otherwise explicitly listed as an advisory action (see Paragraph 2-1.2.b, Advisory Actions) or categorically excluded (see Paragraph 5-6, The Federal Aviation Administration's Categorical Exclusions)).

(15) Issuance of any of the following:

(a) A commercial space launch site operator license for operation of a launch site at an existing facility on developed land where little to no infrastructure would be constructed (e.g., co-located with a Federal range or municipal airport); or

(b) A commercial space launch license, reentry license, or experimental permit to operate a vehicle to/from an existing site.

(16) Formal and informal runway use programs that may significantly increase noise over noise sensitive areas (see Exhibit 4-1).

3-1.3. Actions Normally Requiring an Environmental Impact Statement.

a. Environmental Impact Statements. Under NEPA, the FAA must prepare an EIS for actions significantly affecting the quality of the human environment (see Chapter 4 for additional information regarding significance of impacts). An EIS is a detailed written statement required under Section 102(2)(C) of NEPA when one or more environmental impacts would be significant and mitigation measures cannot reduce the impact(s) below significant levels. Direct, indirect, and cumulative impacts must be considered when determining significance (see Paragraphs 4-2.d and 4-3).

b. Examples. The following are actions that normally require an EIS:

(1) Unconditional ALP approval, or Federal financial participation in, the following categories of airport actions:

(a) Location of a new commercial service airport in an MSA;

(b) A new runway to accommodate air carrier aircraft at a commercial service airport in an MSA; and

(c) Major runway extension.

(2) Issuance of a commercial space launch site operator license, launch license, or experimental permit to support activities requiring the construction of a new commercial space launch site on undeveloped land.

3-2. Programmatic National Environmental Policy Act Documents and Tiering. A programmatic review should assist decisionmakers and the public in understanding the environmental impact from proposed large scope federal actions and activities. A programmatic EIS or EA may be prepared to cover (1) a broad group of related actions; or (2) a program, policy, plan, system, or national level proposal that may later lead to individual actions, requiring subsequent NEPA analysis. A programmatic document is useful in analyzing the cumulative impacts of a group of related actions and when the proposed actions are adequately analyzed can serve as the NEPA review for those actions. Programmatic documents may also be useful in

factors necessary to understand and convey the extent of the impacts on the resource. Maps, plans, photos, or drawings may assist in describing the property and understanding the potential use, whether physical taking or constructive use. Any statements regarding the property's significance by officials having jurisdiction should be documented and attached.

5.3.1. Physical Use of Section 4(f) Property

A Section 4(f) use would occur if the proposed action or alternative(s) would involve an actual physical taking of Section 4(f) property through purchase of land or a permanent easement, physical occupation of a portion or all of the property, or alteration of structures or facilities on the property.

A temporary occupancy of a Section 4(f) property for project construction-related activities is usually so minimal that it does not constitute a use within the meaning of Section 4(f). However, a temporary occupancy would be considered a use if:

- The duration of the occupancy of the Section 4(f) property is greater than the time needed to build a project and there is a change in ownership of the land,
- The nature and magnitude of changes to the 4(f) property are more than minimal,
- Anticipated permanent adverse physical impacts would occur and a temporary or permanent interference with Section 4(f) activities or purposes would occur,
- The land use is not fully returned to existing condition, or
- There is no documented agreement with appropriate agencies having jurisdiction over the Section 4(f) property.

If a project would physically occupy an NRHP-listed or eligible property containing archeological resources that warrant preservation in place, there would be a Section 4(f) use. Although there may be some physical taking of land, Section 4(f) does not apply to NRHP-listed or eligible archeological properties where the responsible FAA official, after consultation with the SHPO/THPO, determines that the archeological resource is important chiefly for data recovery and is not important for preservation in place.

5.3.2. Constructive Use of Section 4(f) Property

Use, within the meaning of Section 4(f), includes not only the physical taking of such property, but also "constructive use." The concept of constructive use is that a project that does not physically use land in a park, for example, may still, by means of noise, air pollution, water pollution, or other impacts, dissipate its aesthetic value, harm its wildlife, restrict its access, and take it in every practical sense. Constructive use occurs when the impacts of a project on a Section 4(f) property are so severe that the activities, features, or attributes that qualify the property for protection under Section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the Section 4(f) property that contribute to its significance or enjoyment are substantially diminished. This means that the value of the Section 4(f) property, in terms of its prior significance and enjoyment, is substantially reduced or lost. For example, noise would need to be at levels high enough to have negative consequences of a substantial nature that amount to a taking of a park or portion of a park for transportation purposes.

The responsible FAA official must consult all appropriate Federal, state, and local officials having jurisdiction over the affected Section 4(f) properties when determining whether project-related impacts would substantially impair the resources. Following consultation and assessment of potential impacts, the FAA is solely responsible for Section 4(f) applicability and determinations.

The land use compatibility guidelines in 14 CFR part 150 (the part 150 guidelines) may be relied upon by the FAA to determine whether there is a constructive use under Section 4(f) where the land uses specified in the part 150 guidelines are relevant to the value, significance, and enjoyment of the Section 4(f) lands in question. The FAA may rely on the part 150 guidelines in evaluating constructive use of lands devoted to traditional recreational activities. The FAA may primarily rely upon the day night average sound levels (DNL) in part 150 rather than single event noise analysis because DNL: (1) is the best measure of significant impact on the quality of the human environment, (2) is the only noise metric with a substantial body of scientific data on the reaction of people to noise, and (3) has been systematically related to Federal compatible land use guidelines.

The FAA may also rely upon the part 150 guidelines to evaluate impacts on historic properties that are in use as residences. The part 150 guidelines may be insufficient to determine the noise impact on historic properties where a quiet setting is a generally recognized purpose and attribute, such as a historic village preserved specifically to convey the atmosphere of rural life in an earlier era or a traditional cultural property. If architecture is the relevant characteristic of a historic neighborhood, then project-related noise would not substantially impair the characteristics that led to eligibility for or listing on the NRHP. As a result, noise would not constitute a constructive use, and Section 4(f) would not be triggered. A historic property would not be considered to be constructively used for Section 4(f) purposes when the FAA issues a finding of no historic properties affected or no adverse effect under Section 106 of the NHPA, 54 U.S.C. § 300101 et seq.. Findings of adverse effects do not automatically trigger Section 4(f) unless the effects would substantially impair the affected resource's historical integrity. The FAA is responsible for complying with Section 106 of the NHPA regardless of the disposition of Section 4(f).

When assessing use of Section 4(f) properties located in a quiet setting and where the setting is a generally recognized feature or attribute of the site's significance, the FAA carefully evaluates reliance on the part 150 guidelines. The FAA must weigh additional factors in determining whether to apply the thresholds listed in the part 150 guidelines to determine the significance of noise impacts on noise sensitive areas within Section 4(f) properties (including, but not limited to, noise sensitive areas within national parks, national wildlife and waterfowl refuges, and historic sites including traditional cultural properties). The FAA may use the part 150 land use compatibility table as a guideline to determine the significance of noise impacts on Section 4(f) properties to the extent that the land uses specified bear relevance to the value, significance, and enjoyment of the lands in question. However, the part 150 guidelines may not be sufficient for all historic sites as described above, and the part 150 guidelines do not adequately address the impacts of noise on the expectations and purposes of people visiting areas within a national park or national wildlife refuge where other noise is very low and a quiet setting is a generally recognized purpose and attribute.

e. Record of Decision. The preparation of a ROD for a CATEX determination is not required and is uncommon. There may be instances where it would be advantageous for the FAA to prepare a separate formal decision document (i.e., a "CATEX/ROD") in connection with a CATEX determination. A CATEX/ROD might be advisable, for example, where there is substantial controversy regarding the applicability of a CATEX and/or the existence of extraordinary circumstances. When there is doubt whether a CATEX/ROD is appropriate, the responsible FAA official should consult with AGC-600 or Regional Counsel.

5-4. Public Notification. There is no requirement to notify the public when a CATEX is used. However, CEQ encourages agencies to determine circumstances in which the public should be engaged or notified before a CATEX is used. The FAA, as a regulatory agency, normally notifies the public when a CATEX is applied to a proposed rulemaking action. Other appropriate circumstances may be determined on a case-by-case basis.

5-5. Other Environmental Requirements. In addition to NEPA, a proposed action may be subject to special purpose laws and requirements that must be complied with before the action can be approved. The responsible FAA official must ensure, to the fullest extent possible, that the proposed action is in compliance with such requirements in addition to making the appropriate determination regarding use of a CATEX. To the extent that these other requirements are relevant to a determination of extraordinary circumstances, they must be addressed before a CATEX is used. The responsible FAA official must document compliance with applicable requirements, including any required consultations, findings, or determinations. The documentation of compliance with special purpose laws and requirements may either be included in a documented CATEX or may be documented separately from a CATEX. Special purpose laws and requirements may also have public notification requirements. Information on other environmental requirements that may apply to proposed actions is provided in the 1050.1F Desk Reference.

5-6. The Federal Aviation Administration's Categorical Exclusions. The FAA has determined that the actions listed in this paragraph normally do not individually or cumulatively have a significant effect on the human environment.

The CATEXs are organized by the following functions:

- Administrative/General: Actions that are administrative or general in nature;
- Certification: Actions concerning issuance of certificates or compliance with certification programs;
- Equipment and Instrumentation: Actions involving installation, repair, or upgrade of equipment or instruments necessary for operations and safety;
- Facility Siting, Construction, and Maintenance: Actions involving acquisition, repair, replacement, maintenance, or upgrading of grounds, infrastructure, buildings, structures, or facilities that generally are minor in nature;
- Procedural: Actions involving establishment, modification, or application of airspace and air traffic procedures; and
- Regulatory: Actions involving establishment of, compliance with, or exemptions to, regulatory programs or requirements.

t. Actions related to the retirement of the principal of bond or other indebtedness for terminal development. (ARP)*

u. Approval under 14 CFR part 161, *Notice and Approval of Airport Noise and Access Restrictions*, of a restriction on the operations of Stage 3 aircraft that does not have the potential to significantly increase noise at the airport submitting the restriction proposal or at other airports to which restricted aircraft may divert. (ARP)

5-6.2. Categorical Exclusions for Certification Actions. This category includes the list of CATEXs for FAA actions concerning issuance of certificates or compliance with certification programs. *An action included within this list of categorically excluded actions is not automatically exempted from environmental review under NEPA. The responsible FAA official must also review Paragraph 5-2, Extraordinary Circumstances, before deciding to categorically exclude a proposed action.*

a. Approvals and findings pursuant to 14 CFR part 36, *Noise Standards: Aircraft Type and Airworthiness Certification*, and acoustical change provisions under 14 CFR § 21.93. (ATO, AVS, APL)

b. Approvals of repairs, parts, and alterations of aircraft, commercial space launch vehicles, and engines not affecting noise, emissions, or wastes. (All)

c. Issuance of certificates such as the following: (1) new, amended, or supplemental aircraft types that meet environmental regulations; (2) new, amended, or supplemental engine types that meet emission regulations; (3) new, amended, or supplemental engine types that have been excluded by the EPA (see 14 CFR § 34.7, *Exemptions*); (4) medical, airmen, export, manned free balloon type, glider type, propeller type, supplemental type certificates not affecting noise, emission, or waste; (5) mechanic schools, agricultural aircraft operations, repair stations, and other air agency ratings; and (6) operating certificates. (ATO, AVS)

d. Operating specifications and amendments that do not significantly change the operating environment of the airport. "That do not significantly change the operating environment of the airport" refers to minor operational changes at an airport that do not have the potential to cause significant impacts to noise, air quality, or other environmental impact categories. These would include, but are not limited to, authorizing use of an alternate airport, administrative revisions to operations specifications, or use of an airport on a one-time basis. The use of an airport on a one-time basis means the operator will not have scheduled operations at the airport, or will not use the aircraft for which the operator requests an amended operations specification, on a scheduled basis. (ATO, AVS)

e. Issuance of certificates and related actions under the Airport Certification Program (see 14 CFR part 139). (ARP)

f. Issuance of Airworthiness Directives (ADs) to ensure aircraft safety. (ATO, AVS)*

* See Paragraph 5-3.a.

Chapter 11: Administrative Information

11-1. Distribution. Notice of promulgation and availability of this Order is distributed to the FAA Assistant or Associate Administrators and their office and service directors, the Chief Operating Officer and vice-presidents of ATO, and the Chairs of the Environmental Network. This Order should be forwarded to all division and facility managers and NEPA practitioners.

A member of the public may obtain an electronic copy of this Order using the Internet by:

a. Visiting the FAA's Regulations and Policies website at http://www.faa.gov/regulations_policies/;

b. Searching the Federal eRulemaking Portal at http://www.regulations.gov; or

c. Accessing the Government Printing Office's website at http://www.gpo.gov/fdsys/.

A member of the public who does not have access to the Internet or is not able to use an electronic version may obtain a CD or hard copy of this Order, for a fee, by sending a request to the FAA, Office of Rulemaking (ARM-1), 800 Independence Avenue S.W., Washington, DC 20591, or by calling (202) 267-9680. Requestors should identify the docket number, notice number, or change number of this Order.

A member of the public may also access all documents the FAA considered in developing this Order through the Internet via the Federal eRulemaking Portal referenced in Paragraph 11-1.b.

11-2. Authority to Change This Order.

a. FAA Administrator. The Administrator reserves the authority to establish or change policy, delegate authority, or assign responsibility.

b. Executive Director of the Office of Environment and Energy (AEE-1). AEE-1 has the authority to add new chapters or appendices or change existing chapters or appendices after appropriate coordination with internal stakeholder organizations. AEE-1 also has the authority to update and amend the 1050.1F Desk Reference.

c. Organizational Elements. Changes proposed by an organizational element within the FAA must be submitted to AEE-1, who will evaluate, or assign a designee to evaluate the changes for incorporation. The LOB/SO must provide AEE with a memorandum describing the proposed change, a detailed justification for the change, and comments from other program offices if the proposed changes or revisions affect them.

11-3. Process for Changing This Order. AEE must, in addition to the formal clearance procedures prescribed in FAA Order 1320.1, *FAA Directives Management*, formally coordinate with AGC, the Office of the Assistant Secretary for Transportation Policy (P-1), and the Office of the General Counsel (C-1), consult with CEQ, and then publish the proposed changes or revisions to this Order in the *Federal Register* for public comment. After receiving all required FAA and DOT concurrences and after a finding of conformity is made by CEQ in accordance with 40 CFR § 1507.3(a), CEQ Regulations, the FAA may publish the final change or revision in the *Federal Register* and implement the revised Order.

property for a park or recreational purpose is temporary. A use that extends over a period of years may be sufficiently long that it would no longer be considered to be interim or temporary, if challenged.

Where the use of a property is changed by a state or local agency from a Section 4(f) type use to a transportation use in anticipation of a request for FAA approval, Section 4(f) will be considered to apply, even though the change in use may have taken place prior to the request for approval or prior to any FAA action on the matter. This is especially true where the change in use appears to have been undertaken in an effort to avoid the application of Section 4(f).

B-2.2. Environmental Consequences.

An initial assessment should be made to determine whether the proposed action and alternative(s) would result in the use of any of the properties to which Section 4(f) applies. If physical use or constructive use of a Section 4(f) property is involved, as further described in B-2.2.1 and B-2.2.2 below, the potential impacts of the proposed action and alternative(s) on the Section 4(f) property must be described in detail. The description of the affected Section 4(f) property should include the location, size, activities, patronage, access, unique or irreplaceable qualities, relationship to similarly used lands in the vicinity, jurisdictional entity, and other factors necessary to understand and convey the extent of the impacts on the resource. Maps, plans, photos, or drawings may assist in describing the property and understanding the potential use, whether physical taking or constructive use. Any statements regarding the property's significance by officials having jurisdiction should be documented and attached.

B-2.2.1. Physical Use of Section 4(f) Property.

A Section 4(f) use would occur if the proposed action or alternative(s) would involve an actual physical taking of Section 4(f) property through purchase of land or a permanent easement, physical occupation of a portion or all of the property, or alteration of structures or facilities on the property.

A temporary occupancy of a Section 4(f) property for project construction-related activities is usually so minimal that it does not constitute a use within the meaning of Section 4(f). However, a temporary occupancy would be considered a use if:

- The duration of the occupancy of the Section 4(f) property is greater than the time needed to build a project and there is a change in ownership of the land;
- The nature and magnitude of changes to the 4(f) property are more than minimal;
- Anticipated permanent adverse physical impacts would occur and a temporary or permanent interference with Section 4(f) activities or purposes would occur;
- The land use is not fully returned to existing condition; or
- There is no documented agreement with appropriate agencies having jurisdiction over the Section 4(f) property.

If a project would physically occupy an NRHP-listed or eligible property containing archeological resources that warrant preservation in place, there would be a Section 4(f) use. However, although there may be some physical taking of land, Section 4(f) does not apply to NRHP-listed or eligible archeological properties where the responsible FAA official, after consultation with the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation

No. 20-1070

ORAL ARGUMENT NOT YET SCHEDULED

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

CITY OF SCOTTSDALE, Arizona
Petitioner
v.

FEDERAL AVIATION ADMINISTRATION, and STEPHEN M. DICKSON, in his official capacity as Administrator, Federal Aviation Administration
Respondents

ADDENDUM OF STANDING DECLARATIONS IN SUPPORT OF PETITIONERS'/APPELLANTS' OPENING BRIEF

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ADDENDUM OF STANDING DECLARATION

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DECLARATION OF SHERRY SCOTT

I, Sherry Scott, hereby declare as follows:

1. I am an attorney licensed to practice in the State of Arizona. I have knowledge of, and am competent to testify regarding, all of the matters set forth herein.

2. I am the City Attorney for the City of Scottsdale, Arizona and I have worked for the City in a legal capacity for over 20 years.

3. The City of Scottsdale ("Scottsdale" or "the City") is a Council-Manager form of municipal government that was incorporated in June, 1951. The City of Scottsdale adopted its first City Charter in November, 1961, which was ratified by the voters and later approved by Arizona Governor Paul Fannin on November 16, 1961.

4. The Arizona Constitution in Article XIII grants cities such as the City of Scottsdale with the ability to adopt a city charter to form its government. City charters establish the structure and powers of local city governments that are deemed necessary to respond to its citizens' needs. Title 9 of the Arizona Revised Statutes further supplements Scottsdale's City Charter authority to define the powers and functions of Scottsdale's government within the State of Arizona.

5. Title 9 of Arizona Revised Statutes and Article 1, Section 3 of Scottsdale's Charter empower Scottsdale with a wide range of authority to make and enforce ordinances and regulations to manage its infrastructure, to protect the health, safety and welfare of its citizens and to preserve and enhance the environment, livability and aesthetic quality of the City.

6. Title 9 of the Arizona Revised Statutes is published on the State's website located at https://www.azleg.gov/arsDetail/?title=9.

7. Scottsdale's Charter is published on Scottsdale's website located at https://www.scottsdaleaz.gov/council/charter.

8. Scottsdale's ability to protect the health, safety and welfare of its citizens and to preserve and enhance the livability, aesthetic and environmental quality of the City within its Charter authority and police powers are some of Scottsdale's most valuable, but intangible, proprietary interests. Scottsdale's powers are used not only to protect the quality of life in Scottsdale, keeping property values high so that sufficient property tax is available to sustain the City, but it also serves to make the City an international travel destination. Scottsdale's tourism industry serves to generate additional tax income necessary to sustain the cost of City services and amenities that are provided to citizens and visitors alike.

9. Historically, the City has passed a number of ordinances directed toward livability, aesthetics and environmental quality. For example, Scottsdale

has adopted an "Environmentally Sensitive Lands Ordinance" ("ESLO") that applies to a significant portion of the City including areas affected by aircraft noise. (Scottsdale Revised Code ("SRC"), Appendix B, Basic Zoning Ordinance, Article VI.) Among the many purposes of ESLO include to "[p]rotect and preserve significant natural and visual resources" and "[r]ecognize and conserve the economic, educational, recreational, historic, archaeological, and other cultural assets of the environment that provide amenities and services for residents and visitors." (SRC, Appendix B, § 6.1011.) Properties within the ESLO are required to provide a dedication of Natural Area Open Space to preserve these sensitive environmental conditions. (SRC, Appendix B, § 6.1060.)

10. In addition to ESLO, the City also imposes noise abatement and standards on various districts in the affected area. (SRC § 5-358; Appendix B, § 5.2808.) The City also has a general ordinance limiting noise creation by business establishments and vendors. (SRC §§ 16-637 & 19-28.)

11. Unfortunately, the Federal Aviation Administration's implementation of flight procedures for Phoenix Sky Harbor resulted in significantly and disproportionately more aircraft flying over residential and business areas in Scottsdale neighborhoods, many of which are part of the environmentally sensitive and Natural Area Open Space lands.

12. The FAA's implementation of the flight procedures at issue and its Final Order issued on January 10, 2020 ("Decision") not to take any further action to provide relief to Scottsdale from increased aircraft noise and pollution has adversely impacted and will continue to adversely impact Scottsdale's proprietary interest in protecting the health, safety and welfare of its citizens from the aircraft noise and air pollution. It has further adversely impacted Scottsdale's ability to preserve and enhance the livability, aesthetic and the environmental quality of the City.

13. Additionally, the FAA's implementation of the flight procedures at issue here and its Decision has harmed Scottsdale's real property interest in several City properties and facilities that Scottsdale either owns or has a real property interest in, which would include McDowell Mountain Ranch Park, Scottsdale McDowell Sonoran Preserve, and the park land Scottsdale is currently developing into a neighborhood park in DC Ranch, just by way of only a few examples.

14. Parks and Natural Area Open Space are at the core of Scottsdale's charm and identity, and these amenities have come at a great cost to Scottsdale and its citizens. Quiet enjoyment is a fundamental attribute to Scottsdale's park lands and open space. The FAA's flight procedures have placed overflights in the direct path of Scottsdale's parks, open space, libraries and other amenities. This has caused the enjoyability of these properties to decline as a result of a substantial

increase in noise and air pollution, which hinders the very purpose of these amenities.

15. Additionally, Scottsdale also owns facilities such as Westworld, which is a City event center that includes outdoor venues for equestrian and other uses. In these places, not only has the aviation noise been detrimental to the purpose of various cultural and equestrian events where quiet can be an essential element to enjoying the music and other sound effects, but the characteristics of these places have also been altered by the noise and fumes emanating from the constant overflights.

16. Scottsdale has invested substantial resources in acquiring and maintaining the aesthetic and inherent historic character of these public amenities and its open spaces. Scottsdale has a concrete interest in protecting the aesthetic, natural and inherent character of these places.

17. The FAA's implementation of flight procedures and its Decision have harmed Scottsdale's real property interests. It has adversely impacted Scottsdale's proprietary interests to protect and enhance the aesthetic and environmental quality of its own property and the property of its (property-tax-paying) citizens.

I declare under penalty of perjury under the laws of United States that the foregoing is true and correct.

Executed this 26th day of April, 2021 in Scottsdale, Arizona.

Sherry R. Scott
Scottsdale City Attorney